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Racial Subordination through Formal Equal Opportunity

Roy L. Brooks

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ROY L. BROOKS*

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PART I INTRODUCTION

Since the death of Jim Crow, national policymakers have attempted to nurture a new prescription for regulating socio-legal relations between Black and White Americans. Although far more moral, decent, and consistent with the values of a liberal democratic state than pervasive racial humiliation sanctioned under Jim Crow, the new racial blueprint — what might be called “formal equal opportunity”¹ — has proven to be an imperfect formula. For the social explorer looking for a cure for racial inequality, formal equal opportunity has too often proven to be little more than a modern-day dinosaur born extinct. For this reason, formal equal opportunity may not be the final expression of interracial relations in the United States.

Three decades after *Brown v. Board of Education*² presaged Jim Crow’s belated demise — a time in which academic lawyers have stimulated some of the most penetrating thinking on civil rights laws³ — the problem of according Black Americans equal opportu-

* Professor of Law, University of San Diego. B.A. 1972, University of Connecticut; J.D. 1975, Yale University.

1. See *infra* text accompanying note 19 for a definition of formal equal opportunity.

2. 347 U.S. 483 (1954).

3. Arranged alphabetically by author, the following commentaries are among the seminal writings on civil rights law during the last 34 years: Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245 (1974); Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Blasi, *Bakke As Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV.

nity in fact as well as in name seems more puzzling than at any other time in American history. Rather than clarification, Americans face an enigma at every major turn: Why, after passage of hundreds of civil rights laws at the national, state, and local levels, do Black Americans seem worse off socially and economically than Black Americans were under Jim Crow? Has the "American Dilemma"⁴ (the American race problem, or unequal socioeconomic conditions in Black America) metamorphosized from a pre-1960s problem of race

21 (1979); Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Brooks, *Affirmative Action In Law Teaching*, 14 COLUM. HUM. RTS. L. REV. 15 (1982); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case"*, 17 RUTGERS L. REV. 531 (1963); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 UCLA L. REV. 1147 (1966); Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389 (1985); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Karst, *The Supreme Court, 1977 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006 (1984); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Snadalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); St. Antoine, *Color Blindness but not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1979).

4. See G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

into a post-1960s problem of class and power? If today's civil rights problem translates into class warfare, is it amenable to a resolution through the civil rights laws?

These questions will continue to frustrate analysis and action in civil rights unless changes are made in the way legal scholars within and outside law schools think about civil rights laws and practices developed to promote formal equal opportunity. Modern civil rights inquiry tends to proceed along, or at least incorporates in major ways, two traditional lines of legal analysis taught in American law schools.⁵ One is formalistic, the major concern of which is the internal order of law, deductive logic, or what Roberto Unger has called "a restrained, relatively apolitical method of analysis."⁶ The other is instrumental, in which there is less concern with the immanent rationality of law — with perfectly symmetrical positioning of legal premises — than with a utilitarian rationality of law — law's social consequences.⁷ My criticism of civil rights analysis has less to do with a particular mode of inquiry⁸ than with the failure of commentators employing legal conceptual schemes to ask the right question — the "subordination question."

The subordination question calls for more than a discussion of the various ways in which antidiscrimination laws subordinate Black Americans.⁹ It requires one to be at particular pains to pinpoint and

5. Perhaps the best introduction to legal formalism and legal instrumentalism is still to be found in the writings of Justice Holmes. See, e.g., O. HOLMES, *THE COMMON LAW* (M. Howe ed. 1963); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Holmes, *Codes and the Arrangement of the Law*, 5 AM. U.L. REV. 1 (1870), reprinted in 44 HARV. L. REV. 725 (1931). Holmes, of course was highly critical of legal formalism. His legal perspective was largely derived from Jeremy Bentham and other early English utilitarians. See, e.g., H. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984). For a recent defense of formalism, see, Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

6. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 565 (1983).

7. Most civil rights scholars today lean toward instrumentalism. See, e.g., Bell, *supra* note 3, at 80; Brooks, *supra* note 3, at 35; Ely, *supra* note 3, at 723; Karst & Horowitz, *supra* note 3, at 964-66; Michelman, *supra* note 3, at 13; Van Alstyne, *supra* note 3, at 803-10; Wasserstrom, *supra* note 3, at 615-22.

8. A utilitarian approach does, however, seem fundamentally sound, if not absolutely necessary, in a complex, changing society. Moreover, assessing the social results of a rule of law is the only way to determine its success or failure, or, to paraphrase Holmes, to determine whether a rule of law can be tamed and made a useful animal. See, Holmes *The Path of Law*, *supra* note 5, at 469.

9. This is how issues of racial subordination are normally treated, if raised at all. See, e.g., D. BELL, *RACE, RACISM AND AMERICAN LAW* 41 (2d ed. 1980); NATIONAL INSTITUTE OF MENTAL HEALTH, *INSTITUTIONAL RACISM AND COMMUNITY COMPETENCE* (O. Barbarin, P. Good, O. Pharr, & J. Siskin eds. 1981); Bell, *supra* note 3; Kennedy,

then to analyze the subordinating force or mechanism in civil rights law, which I believe to be formal equal opportunity. Taking formal equal opportunity as the subordinating agent, my analysis of the concept leads me to conclude as follows: If we are to believe, as I think we must,¹⁰ that formal equal opportunity is intended to cure the damage caused by racism — unequal socioeconomic conditions, or in other words, the American race problem — then formal equal opportunity is a tailed public policy. Too often formal equal opportunity subordinates each class within Black society, and this racial subordination feeds the American race problem. Whether racial subordination is engineered through avowed, unconscious, or institutionalized racism or through a nonracial balancing of contraposed interests is quite beside the point. The point is that Black Americans are subordinated and suffering; their civil rights interests receive relatively low or no deference at critical moments and the American race problem continues unabated. This is, indeed, ironic because civil rights is the one arena in American society in which Black interests should receive top priority.

In short, the subordination question is primarily concerned with formal equal opportunity's implementation,¹¹ and envisions that an analysis of such will proceed along a particular line of inquiry, which has two basic features. The first feature requires that the discussion of racial subordination be deeply anchored in the social and economic stratification that now characterizes Black society.¹² Civil rights analysis resting on a clear understanding of socioeconomic class within Black society will facilitate pointed examination of issues of race and class. It can help to determine, for example, whether *systemic* racial subordination ended with slavery and Jim Crow, or whether the historical process of racial subordination continues to exist but in a different form.

The second feature of the analysis calls for a precise articulation of the *nexus* between current racial subordination and the American race problem — socioeconomic vulnerability within Black society. In this way the disutility of civil rights laws in the lives of Black Americans can be clearly seen. Also, the manner in which the nation's interracial regulatory system interferes with a resolution of the American race problem can, once again, be plainly established.

In focusing on the subordination question, my treatment of racial

Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 HARV. L. REV. 1327, 1342-44 (1986). For a definition of racial subordination, see *infra* text accompanying note 13.

10. See *infra* text accompanying notes 15-19, 57-58.

11. See *infra* text accompanying note 19 for a discussion of the meaning of formal equal opportunity.

12. See *infra* Parts III A, IV A, V A. See also W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 152 (1978).

subordination in civil rights — the notion that civil rights doctrine, practices, and policy give low priority to matters of keen interest to Black Americans or otherwise call upon Black Americans to endure a disproportionate share of societal hardships¹³ — differs significantly from that offered by other “revisionists” civil rights scholars, the most prominent being Derrick Bell.¹⁴ Rather than discuss how the civil rights laws subordinate Black Americans, I attempt to identify the subordinating force within civil rights law and analyze its racial subordination in a way that is more sensitive to class stratification in today’s Black society and in a way that connects racial subordination to unequal socioeconomic conditions in Black society. In the process, I attempt to restructure Black society into three distinct socioeconomic classes — the Black middle class, the Black working class, and the Black underclass — to reflect Black society’s current reality. In short, how racial subordination through formal equal opportunity is manifested along class lines and how it affects the American race problem are the major elements of what I call the subordination question.

I have attempted to pull together this genre of civil rights analysis in the pages of this article. My basic thesis is the following: To the extent that formal equal opportunity is intended to be a cure for the American race problem, it is a failed public policy, because although conceptually sound, it is operationally flawed. The endeavor to explicate my thesis begins after a more detailed discussion of formal equal opportunity.

PART II FORMAL EQUAL OPPORTUNITY

Formal equal opportunity is the nation’s fundamental civil rights public policy. Like its predecessor civil rights policy (the separate-but-equal policy under Jim Crow¹⁵), formal equal opportunity seeks

13. See sources cited *supra* note 9. For a discussion of racial subordination as a form of racism, see, e.g., Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 L. & INEQUALITY J. 101, 109 (1987).

14. See D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987). Revisionist scholarship also includes works by Chrenshaw, Delgado, Freeman, Jordan, Kennedy, and other writings by Bell cited *supra* notes 3 and 9. For a discussion of revisionist civil rights scholarship in the larger context of civil rights scholarship, see *infra* text accompanying note 53.

15. *Plessy v. Ferguson*, 163 U.S. 537 (1896) established separate-but-equal as a national civil rights policy.

to regulate in rather broad terms the treatment government, and to a lesser extent private individuals, accord to society's racial groups in relation to one another. Formal equal opportunity, in other words, determines the direction and tone of interracial relations in our society today.

Clearly, the past holds the key to understanding formal equal opportunity. The meaning and significance of this civil rights policy is rooted in the community attitudes and beliefs that fueled Jim Crow's separate-but-equal policy. For, formal equal opportunity is intended to run in the opposite direction of Jim Crow policy and all that such policy represents.¹⁶

The community attitudes and beliefs of a Jim Crow nation, which, of course, did not include Black community attitudes and beliefs, were unmistakable. Black Americans were regarded as an alien breed lower than the community of White Americans. Several unkind stereotypes of Black Americans lay at the bottom of this cruel view of Black Americans. Blacks were thought to be bestial, unteachable, uncouth, odious, and inferior to Whites in every essential respect. In 1896, the Supreme Court in *Plessy v. Ferguson*¹⁷ determined that these community attitudes and beliefs had gelled into a strong community expectation concerning interracial relations — the races are to be held separate but equal, meaning, of course, unequal. The separate-but-equal policy, supported by a prominent Black American, Booker T. Washington, was thereby born, and a parade of laws designed to enforce it soon followed. These laws, which mandated "Colored" and White public accommodations, schools, libraries, restrooms, drinking fountains, and so forth, as well as condoned ubiquitous discrimination against Black Americans,¹⁸ endured until formal equal opportunity reached the level of public policy in the 1950s and 1960s.

Formal equal opportunity is a first-time blend of Black (genuine Black) and White community expectations having the force of law. At its most basic level, formal equal opportunity can be defined as a civil rights policy in which Black and White Americans are held to be of equal legal status. The races are deemed to differ in no legally material way. They are, therefore, entitled to equal legal treatment. Racism and its humiliating effects — segregation and discrimination — are no longer the official policies of or condoned by the

16. For an extensive discussion of the transition from a separate-but-equal public policy to one of formal equal opportunity, see, e.g., J. WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* (1987); R. KLUGER, *SIMPLE JUSTICE* (1976); C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d. ed. 1966).

17. 163 U.S. 537 (1896).

18. See, e.g., J. WILLIAMS, *supra* note 16, at 37-257; R. KLUGER, *supra* note 16, at 1-256; C. WOODWARD, *supra* note 16, at 67-110.

government.¹⁹

Formal equal opportunity has not, of course, reversed all negative attitudes White Americans held toward Black Americans in the Jim Crow era. Racism and stereotypes of Black Americans continue to thrive in our society. The survival of these racial attitudes does not, however, call into question formal equal opportunity's legitimacy as our current public policy. So many social institutions and conventions have been built around formal equal opportunity that community expectations favoring formal equal opportunity are clearly stronger and more consistent with our liberal democratic society than those favoring separate-but-equal treatment.

In Thomas Kuhn's *The Structure of Scientific Revolutions*, we learn that new paradigms often have a long and uncertain gestation period.²⁰ The same is true with formal equal opportunity. The first serious indication that formal equal opportunity might replace separate-but-equal as the nation's civil rights policy came during the Second World War. President Roosevelt issued Executive Order 8802 on June 25, 1941, which (in what has become standard legal jargon for creating formal equal opportunity rules of law) "prohibited discrimination on the basis of race, creed, [or] color . . ." in certain areas of federal employment, vocational training programs administered by federal agencies, and the national defense industry.²¹ Executive Order 8802 also created a federal agency, called the Fair Employment Practice Committee, which was authorized to receive and investigate charges of employment discrimination, redress proven grievances, and make recommendations to effectuate the Executive Order's purposes.²²

Flashes of formal equal opportunity appeared in the military itself during the Second World War. Prior to the War, Black Americans in the armed services were confined to segregated units and assigned noncombat, low-status jobs, usually in labor details. Black soldiers in the First World War, for example, were trained in the United States, often using broom sticks as weapons, but fought gallantly in Europe not as Americans but as part of the French armed forces. The experiences of Black soldiers, in other words, reflected the experiences of Blacks in American society as a whole under Jim Crow. By the end of the Second World War: the army desegregated most

19. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

20. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970).

21. Exec. Order No. 8802, 3 C.F.R. 957 (1941).

22. *Id.*

of its officer candidate schools, but Army Air Corps training was still segregated; the Navy had its first Black commissioned officer, but Black sailors generally were permitted to serve on ships only as mess stewards; and the Marine Corps, which had been exclusively White since the late 18th century, enlisted Black Americans but assigned them to segregated units.²³

Although racial progress in the military during World War II was minor, matters were greatly improved by the time the next major war came about. Black Americans were allowed to fight for their country in all branches of the service in desegregated units during the Korean War. This turn of events was the direct result of Executive Order 9981, signed by President Truman on July 26, 1948, which required "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin."²⁴ A companion order, Executive Order 9980, signed on the same day, brought formal equal opportunity to most areas within the federal government's civilian departments.²⁵

More than the altruism of lawmakers, the confluence of several domestic and international conditions brought about these early promulgations of formal equal opportunity. Demographic changes in the industrialized North was a crucial factor. Between 1940 and 1944, 470,000 Black Americans moved from the rural regions of the South to the urban areas of the North looking for better jobs and better racial relations. This influx of Black Americans had to be absorbed by the cities, placed desegregative pressures on employment markets, and, most importantly, provided a welcomed supply of male labor for hungry civilian industries supporting the war effort.²⁶

The war itself was an important motivation for the executive orders issued by Presidents Roosevelt and Truman. Fighting for democracy abroad made it increasingly difficult to defend racial oppression at home. Black Americans, who saw the contradiction, applied pressure on government officials by increasing demonstration marches and other forms of protests. Union leader A. Philip Randolph's threatened march on Washington in 1940, which helped to persuade President Roosevelt to issue Executive Order 8808, is an

23. See, e.g., Moskos, *Blacks in the Army: Success Story*, CURRENT, Sept. 1986 at 10; McGuire, *Desegregation of the Armed Forces: Black Leadership, Protest and World War II*, 63 J. NEGRO HIST. 147-58 (1983); Schafer, *Freedom Was As Close As The River: The Blacks of Northeast Florida and the Civil War*, 23 ESCRIBANO 91-116 (1986); Howard-Filler, *Two Different Battles*, 71 MICH. HIST. 30-33 (1987); Dowd, *Declarations of Dependence: War and Inequality in Revolutionary New Jersey, 1776-1815*, 103 N.J. HIST. 46-47 (1985). One of the best books on Blacks in the military is R. HOPE, *RACIAL STRIFE IN THE U.S. MILITARY* (1979).

24. Exec. Order No. 9981, 3 C.F.R. 722 (1948).

25. Exec. Order No. 9980, 3 C.F.R. 720 (1948).

26. See generally J. FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 523-545 (3d ed. 1969).

example of the new activism that took hold of Black Americans. The success of an activist form of Black self-help also served to convince Booker T. Washington's followers that it was time to jettison their support for separate-but-equal and embrace a more assertive civil rights policy — formal equal opportunity — advocated by such Black leaders as W.E.B. DuBois and A. Philip Randolph.²⁷

Finally, the rise of Keynesian economics and the decline of laissez-faire economics in the United States during the 1930's made government-intervention schemes, such as formal equal opportunity, seem proper. Indeed, the failure of laissez-faire government to prevent or to extricate the nation from severe economic depression made government regulation of institutional behavior seem not only legitimate but also necessary.²⁸

Formal equal opportunity during the war years was but a community impulse struggling to become a public policy. Separate-but-equal was still the dominant community value — it was still "law" — although it had been significantly vitiated.

Formal equal opportunity came of age on May 17, 1954, when the Supreme Court handed down its momentous decision in the cases consolidated under *Brown v. Board of Education*.²⁹ Against the backdrop of all the pressures that caused Presidents Roosevelt and Truman to establish pockets of formal equal opportunity in selected areas of American life, and with the momentum of a line of its own cases chipping away at separate-but-equal,³⁰ the Supreme Court in *Brown I* took a decisive turn for the better in the government's approach to race relations in the United States. *Brown I* was the first act of government to make the ideal of racial equality a constitutional imperative and, hence, unequivocally the official civil rights policy of the United States. In *Brown I*, a unanimous Supreme Court

27. See, e.g., Dorn, *Truman and the Desegregation of the Military*, FOCUS, May 1988, at 3-4.

28. See J. FRANKLIN, *supra* note 26, at 546-611.

29. 347 U.S. 483 (1954).

30. See, e.g., *Shelly v. Kraemer*, 334 U.S. 1 (1948) (14th Amendment Equal Protection Clause prohibits state enforcement of racially-restrictive covenants in housing); *Sweatt v. Painter*, 339 U.S. 629 (1950) (Black law students ordered admitted to all-white University of Texas Law School on ground that the state law school established for Blacks failed to offer equal educational opportunity); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950) (State-imposed restrictions placed on Black graduate students attending an otherwise all-White university produced such inequalities as to offend the equal protection clause); *Henderson v. United States*, 339 U.S. 816 (1950) (Southern Railway's discriminatory dining-car regulations violate equal protection clause). For the best account of the legal history leading up to *Brown I* see R. KLUGER, *supra* note 16.

promulgated, as the Court itself would later say, “the fundamental [policy] that racial discrimination in public education is unconstitutional,” and declared that “[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield to this [policy].”³¹

Even though *Brown I* dealt solely with the issue of public education, the fact that for the first time the Supreme Court construed the Constitution, the nation’s legal infrastructure, to require nonracial access to such an essential societal bounty as public education would inevitably project a towering shadow over virtually every aspect of interracial relations in this country. Indeed, *Brown I* has been credited with engendering “a social upheaval the extent and consequences of which cannot even now be measured with certainty.”³² *Brown I* is important because it changed the *legal* status of Black Americans from mere supplicants “seeking, pleading, begging to be treated as full-fledged members of the human race” to persons entitled to equal treatment under the law.³³

In the years following *Brown I*, courts and legislatures have identified and accentuated two major operational tenets derived from formal equal opportunity. These tenets have guided the manner in which legal institutions and the community at large have applied formal equal opportunity since *Brown I*. Today, formal equal opportunity is often defined in terms of these operational tenets.

The first is racial omission, or what some might call colorblindness. Racial omission may only be a restatement of formal equal opportunity’s fundamental meaning discussed earlier in this part of the article — equal legal status and treatment. Racial omission is the belief that racial differences should be ignored and omitted from legal consideration. Rules of law and practices regulating access to education, employment, housing, and other societal bounties must be formulated without regard to race or racial dynamics. Black and White Americans are entitled to be treated the same in all essential respects by the government. Accordingly, Black Americans may not receive any opportunities not also available to White Americans, and vice versa.

Racial integration is the sibling tenet of racial omission. Racial integration is racial mixing. It is simply any governmental policy that mandates or encourages a physical merger or juxtaposition of Black and White Americans. If the government favors racial integration, it necessarily must disfavor racial separation. Both policies cannot be promoted simultaneously.

31. *Brown v. Board of Educ.* [*Brown II*], 349 U.S. 294, 297 (1955).

32. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 247 (1968).

33. *Id.*

Racial integration should be contrasted with desegregation. Desegregation is the removal of legal restraints on one's actions or designations on one's status intended to stigmatize. The removal of these government-imposed conditions permits a group or its members to choose to go their separate or integrated ways. Racial integration, then, presupposes desegregation.

The Civil Rights Act of 1964,³⁴ the Voting Rights Act of 1965,³⁵ and the Fair Housing Act of 1968³⁶ are the most significant federal rules of law implementing the twin tenets of racial omission and racial integration. More sweeping than any other piece of civil rights legislation in American history, the 1964 Civil Rights Act has eleven titles each of which prohibits discrimination "on the basis of race or color" in a major sector of American life: voting (Title I), public accommodations (Title II), public education (Title IV), and employment (Title VII) to mention a few. The 1965 Voting Rights Act vastly improves the voting protections offered by Title I of the 1964 Civil Rights Act (which mainly establishes standards applicable to voter registration) by banning all forms of racial discrimination in voting (from literacy tests to complex schemes of vote dilution) and by enforcing these rights with powerful remedies. Finally, the 1968 Fair Housing Act makes it illegal for certain property owners, real estate agencies, and lenders to discriminate "on the basis of race or color" in the sale or rental of housing.

After all the civil rights laws and passions promoting formal equal opportunity since *Brown I*, scores of Black Americans are still living a life that in many ways is commensurate with second-class citizenship, a life that in many respects is Jim Crow all but in name. For example, Black median family income was 60 percent of White median family income in 1968, but fell to 57 percent by 1986. The number of Black males unemployed or no longer looking for jobs increased by an astounding 155 percent between 1970 and 1985. While the rate of Black male and female unemployment has generally been twice the rate of White male and female unemployment since the end of the Second World War, the Black unemployment rate increased to 2.7 times that of Whites by March 1988. Also, the percentage of Black families receiving aid for dependent children

34. Civil Rights Act of 1964, ch. 20, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971 to 2000h-6 (1982)).

35. Voting Rights Act of 1965, ch. 20, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-73 (1982)).

36. Fair Housing Act of 1968 (Title VIII), ch. 45, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (1982)).

(AFDC) increased from 11.6 percent in 1967 to 23.6 percent in 1983 (compared to an increase from 1.5 percent to 2.7 percent for White families during the same period). In addition, the share of Black families headed by a female increased from twenty-four percent in 1965 to forty-four percent by 1985 (compared to an increase from nine percent to thirteen percent for White families during this period). By the middle of the 1980s, one of every three Blacks (35.7 percent) and nearly half of all Black children (46.7 percent) were living in poverty. With fifty-two percent of Black female-headed families living in poverty by 1985, female-headed families have come to constitute the largest segment of poor Blacks.³⁷

The post-1960s, on the other hand, has been a boon for millions of other Black Americans. Improvements in education, occupational status, and homeownership during this period have launched many Blacks into the American middle class. For example, the percentage of Black white-collar workers increased from 19.5 percent to 40.9 percent and the percentage of Black domestic workers decreased from 12.6 percent to 2.8 percent between 1965 and 1985. Likewise, the percentage of Black Americans who own their homes increased from thirty-eight percent to forty-five percent between 1960 and 1983.³⁸

As impressive as these improvements may seem, it would be a large mistake to conclude that Black Americans on balance are thriving. Even taking post-1960s progress into account, the average aggregate racial differential between White and Black Americans (or "racial gap") stands at approximately two-to-one today, which is about where it was a generation ago. For example, the racial differential in the crucial areas of unemployment, poverty (even excluding female-headed families), and income is about two-to-one in favor of Whites.³⁹

37. See e.g., UNITED STATES BUREAU OF THE CENSUS, PUB. NO. 152, CURRENT POPULATION REPORTS SERIES 60; U.S. NEWS & WORLD REP., Mar. 17, 1986, at 21. J. SMITH & F. WELCH, CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS xxiv-xxv, 81, 101-11 (Rand Corp. ed. 1986) [hereinafter RAND RPT.]; CENTER ON BUDGET AND POLICY PRIORITIES, FALLING BEHIND: A REPORT ON HOW BLACKS HAVE FARED UNDER THE REAGAN POLICIES 4 (1984).

38. See e.g., U.S. NEWS & WORLD REP., Mar. 17, 1986, at 21; RAND RPT., *supra* note 37, at 4-41.

39. The unemployment rates for Black men and Black women remained at about two times the rate for White men and White women from 1960 through 1975. UNITED STATES DEP'T OF COM., CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, PUB. NO. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1970-1978 20 (1979) [hereinafter cited as POPULATION RPT.]. This ratio is 2-to-1 for adult males. For Black male teenagers, however, the unemployment rate has more than doubled that of White male teenagers in the 1980s. See, e.g., RAND RPT, *supra* note 37, at 108-09. In 1980, the percentages of Black males and Black intact-families living in poverty were twice as high as the percentages for their White counterparts. This is down from the 3-to-1 ratio for both categories in

The major argument advanced in this article is that there is a relationship between formal equal opportunity and unequal socioeconomic conditions within today's Black society. I attempt to argue, in other words, that there is something dreadfully wrong about the way our fundamental civil rights policy has been *applied* since *Brown I*.

Some instrumentalists,⁴⁰ particularly legal realists,⁴¹ would argue that formalism is what is wrong with formal equal opportunity, that formal equal opportunity has not been grounded in the social reality it seeks to regulate. For example, the late Judge Skelly Wright, one of the most influential modern legal realists, faulted those who would apply our civil rights law and policy in a way that is too concerned with abstractionism, deductive logic, and internal consistency.⁴² Judge Wright would advise judicial decisionmakers implementing formal equal opportunity to proceed from the Holmesian maxim concerning the content and growth of law — "The life of the law has not been logic; it has been experience"⁴³ — rather than from the Langdellian syllogism⁴⁴ —

	All	P are M	[principle of law from FEO]
	No	S are M	[crucial facts of problem]
Ergo,	No	S are P	[authoritative decision]

1960. *Id.* at 103. Black male and Black intact-family incomes were 72.2 percent and 82 percent, respectively, as high as their White counterparts in 1980, compared to 58.1 and 61.4 percent, respectively, in 1960. *Id.* at 104. Median income for all Black Americans was only 55 percent of the median income for all White Americans in 1984. *Id.* at 84. In 1960, the figure was approximately the same, 55 percent. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971 at 316 (92d ed. 1971); UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART I, G 189-256 (1975).

40. For a discussion of instrumentalism, see *supra* text accompanying note 7.

41. Legal realism, a form of instrumentalism, purports to be a realistic and scientific view of the law, meaning that it: (a) focuses on what judges do rather than on what judges say; (b) is cognizant of the consequences judicial decisions have on the community; and (c) believes all legal institutions operate pursuant to a pleasure-pain calculus in which they attempt to maximize the welfare of the greatest number of individuals within the community. See, e.g., J. FRANK, LAW AND THE MODERN MIND (1930); K. LLEWELLYN, JURISPRUDENCE (1962). See also *supra* note 5.

42. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

43. O. HOLMES, *supra* note 5, at 5. This expression appears in a somewhat different form in an unsigned review of Langdell's Contracts book. See Book Note, 14 AM. L. REV. 233 (1880).

44. This reference is to legal formalism promoted by the famous Harvard Law School Dean, C.C. Langdell. See C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871). Not surprisingly, this book received a negative review from Holmes, who was an instrumentalist. See *supra* note 5.

While there are instances in which judicial and nonjudicial decisionmakers implementing formal equal opportunity have not been attentive to socioeconomic reality, there are also many instances in which decisionmakers, especially judges, do attempt to ground their decisions in that reality. And many of these decisionmakers are generally supportive of civil rights. For example, the Supreme Court in *Bakke*⁴⁵ sincerely tried to devise a remedy that could deal with the real-life admissions obstacles Black students face without at the same time undermining the intellectual integrity of formal equal opportunity.

The real problem with the application of formal equal opportunity has less to do with formalism than with the degree of deference given to a Black American view of reality. It is the quantum of priority that is sometimes given to Black civil rights interests in the implementation of formal equal opportunity that concerns me most. Formal equal opportunity (or more precisely its twin operational tenets of racial omission and racial integration) gives low priority, low weight to Black civil rights interests at critical times. Civil rights, which under formal equal opportunity is intended to level the playing field for Blacks lopsided by a long-term policy of separate-but-equal, would seem to be the one arena in American society in which Black interests should receive top priority.

With the advent of class stratification in Black society since the 1960s, Black civil rights interests occasionally conflict. This, of course, makes it more difficult to vindicate Black civil rights interests. Yet in most instances, Black civil rights interests are not contraposed, and the conundrum of which Black civil rights interest gets vindicated does not usually present itself.⁴⁶

The low deference given to Black civil rights interests under formal equal opportunity is a point of view that has largely escaped the attention of civil rights scholars who write in what Judge Wright disparagingly called the "scholarly tradition."⁴⁷ Some of these scholars are Langdellian in their excessive preoccupation with general principles of universal application, perhaps the most well-known being Herbert Wechsler who in a highly controversial article entitled, "Toward Neutral Principles of Constitutional Law,"⁴⁸ totally neglected the social reality of racism in his criticism of *Brown v. Board of Education*. These scholars would be expected to miss the issue of

45. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1976).

46. The integrationist interest of middle- and working-class Blacks may, however, conflict with the separatist interest of the Black underclass. See *infra* Part V B2.

47. WRIGHT, *supra* note 42.

48. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The article was later published in H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 3 (1961).

Black civil rights interests.

But other scholars who have missed the issue are instrumentalists or legal realists and (like Wechsler) basically supportive of civil rights. These scholars, as Richard Delgado aptly demonstrates in his article entitled, "The Imperial Scholar: Reflections on a Review of Civil Rights Literature,"⁴⁹ are ill-attuned to or have not concentrated on Black civil rights interests. Scholars as prominent as Tribe and Michelman of Harvard Law School, Ackerman and Fiss of Yale Law School, and Ely and Brest of Stanford Law School have focused more on issues of process and institutional legitimacy than on the lack of vindication of Black civil rights interests by decisionmakers.⁵⁰ Ronald Dworkin's limited discussion of civil rights law and policy is more concerned with developing a theory of law as an alternative to natural law and to H. L. A. Hart's positivism⁵¹ than with developing a theory of law centered on Black civil rights interests.⁵² While those writing in the "scholarly tradition" have made important contributions to civil rights scholarship and to the quest for racial justice in this country, none of them have developed the point that I believe needs to be advanced today: *By giving low priority to Black equality interests, formal equal opportunity ineluctably contributes to Black socioeconomic inequality.*

Unrestrained by the "scholarly tradition," Black and White revisionist civil rights scholars (such as Bell, Delgado, Freeman, and Jordan) have advanced the claim that civil rights law subordinates Black Americans or, in other words, frequently marches to the beat of the perpetrator's perspective (Whites) rather than the victim's perspective (Blacks).⁵³ I want to go deeper and further than that claim. I want to (a) pinpoint and explore the content of the subordinating agent in our civil rights regime (formal equal opportunity); (b) restructure Black society to reflect current socioeconomic stratifi-

49. Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

50. *See id.* at 566-573.

51. *See*, H. HART, *THE CONCEPT OF LAW* (1961).

52. *See, e.g.*, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Dworkin attacks the positivist belief that courts in "hard cases" (i.e., cases which cannot be brought under a clear rule of law laid down by a legal institution in advance) have "discretion" to decide such cases either way on the basis of policy. He argues that courts in such cases lack institutional legitimacy to decide the cases on the basis of policies; they can only decide them on the basis of principles. Policy decisions are committed to the discretion of the legislature. For a criticism of this thesis, *see, e.g.*, Ursin, *Judicial Creativity And Tort Law*, 49 GEO. WASH. L. REV. 229, 235 n.24 (1981).

53. *See supra* note 14 for sources on revisionist civil rights scholarship.

cation; (c) identify the major class problems (the dimensions of the American race problem) relative to each segment of Black society; (d) explain how formal equal opportunity subordinates each class; and (e) connect such racial subordination to these dominant class problems.

Before I leave the starting gate, two arguments warrant a response at this time, only because my response to these arguments may help to further clarify our understanding of formal equal opportunity. The first argument is that formal equal opportunity only intended to equalize the legal status and treatment of the races; it never sought to directly affect the socioeconomic conditions of Black Americans relative to those of White Americans. The second argument is that even if formal equal opportunity was supposed to reach the relative living conditions of Black and White Americans, it never sought to assure equality of results, only equality of treatment by government.⁵⁴

My initial response to these arguments is to recognize the concession in both arguments that formal equal opportunity has had a greater impact on Black Americans at the normative level than at the ground level. For part of my contention is that Blacks and Whites are accorded equal treatment by government more in theory than in the pleasures and burdens of daily life. Blacks have certainly received a legalistic, formalistic type of equality; hence, the word "formal" in the term "formal equal opportunity." But that type of equality is a poor proxy for the real thing — an equal chance to improve or protect one's socioeconomic condition.

This leads to a response to the second argument, which is the familiar equality of treatment versus equality of results or achievement argument. I fault formal equal opportunity (or more precisely its thirst for racial omission and racial integration) for its inability to deliver equal socioeconomic opportunity, not equal socioeconomic results. Formal equal opportunity equalized the legal status and treatment of Black and White Americans, but it does little more than that to redress socioeconomic disparities caused by centuries of unequal legal status and treatment of the races. The government could have redressed socioeconomic disparity directly by simply upgrading the living conditions of Black Americans (such as, by giving them better housing and jobs in proportion to their population percentage) or indirectly by providing Black Americans with solid opportunities to create socioeconomic parity or better (such as, by providing them with the means to win the battle against employment discrimina-

54. For further discussion of this argument see e.g., Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 337-40 (1971).

tion⁵⁵). The former strategy, which looks to the outcome of the race, is unthinkable if it displaces White Americans. The latter approach, which focuses on the starting positions in the race, is quite proper. Yet, formal equal opportunity has provided Black Americans with fewer opportunities to improve or to protect employment, housing, and educational conditions than White Americans of comparable socioeconomic classes have enjoyed with or without the aid of civil rights laws and policies, including the primary policy of formal equal opportunity.⁵⁶ The fact that formal equal opportunity undoubtedly has helped Black Americans more than it has White Americans (mainly because Blacks have been in need of its services more than Whites) is quite beside the point. The point is that formal equal opportunity was designed to level the playing field for Black and White Americans, and this it has done more so within the rarefied pages of the law books than within the mundane living conditions of Black society. To claim that the playing field should be level — that Blacks should have the same opportunities in reality as Whites to augment or preserve their socioeconomic position — is quite different from claiming that the results or achievement of the competition should be equal. I make the former not the latter claim.

This is not to say that the results of the competition are entirely irrelevant. They in fact are probative of the condition of the playing field. For example, substantial disparity between the incomes of comparably educated and experienced Blacks and Whites gives evidence of racial discrimination.

The first argument — that formal equal opportunity is not supposed to do anything about Black America's socioeconomic condition — flies in the face of fact and logic. Formal equal opportunity, as discussed earlier,⁵⁷ came into existence as a response to Jim Crow's separate-but-equal policy. Living under the latter civil rights policy, Blacks were certainly separate from Whites and clearly not equal to Whites both in law and in socioeconomic reality. Formal equal opportunity seeks to reverse every aspect of its predecessor policy; it does not seek a partial reversal. Furthermore, it is nonsense to think that formal equal opportunity would attempt to equalize the legal status and treatment of Blacks without some expectation and hope that tangible benefits would accrue to Blacks. This was certainly the thinking of the Black lawyers who argued the school desegregation

55. See *infra* Part III B2.

56. See *infra* Parts III B2, IV B2, and V B2.

57. See *supra* text accompanying note 15-19.

cases,⁵⁸ and, indeed, of anyone who seeks a redress of legal rights in court. It was also the thinking of the dedicated social engineers and legal institutions that helped to nurture formal equal opportunity. If it was not, why would they have bothered to promote such a policy?

I shall present the details of my argument against formal equal opportunity in the remaining parts of this article. I begin with the Black middle class.

PART III BLACK MIDDLE CLASS

A. *Defining Characteristics*

Although rarely defined, the term “middle class” is widely used in American society. It is a term that purports to measure socioeconomic success in America. Since Americans like to view themselves as a successful people, there is little wonder that most Americans consider themselves to be members of the middle class. Yet, as one commentator has indicated, this “all-inclusive category . . . [is] so broad that it not only blurs real distinctions in income, lifestyle, and well-being but often clouds public discussion as well.”⁵⁹ Quite simply, the term “middle class” needs to be carefully (and perhaps narrowly) defined before it can be gainfully employed in public discourse.

Yet, it may be impossible to arrive at a definition acceptable to everyone. The debate among Black scholars illustrates this point.

Sociologist Bart Landry defines middle-class status in terms of occupation. In his book, *The New Black Middle Class*, he equates middle-class status with white-collar occupations. By white-collar occupations, Landry means sales and clerical workers as well as professionals and business managers.⁶⁰

While I might disagree with some of the occupations he classifies as middle class — for example, I would view sales and clerical positions as working-class occupations — I believe Professor Landry’s occupational approach is useful. An individual’s occupation reveals something about his or her socioeconomic status. Primarily, it indicates the stability of one’s income stream. For example, an automobile worker, who endures periodic layoffs and contract negotiations, has a less stable earnings stream than a computer analyst, who enjoys a high degree of job security and mobility, even though both workers might earn about the same amount. Occupational status

58. See, e.g., R. KLUGER, *supra* note 16; ARGUMENT: THE COMPLETE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55 (L. Friedman, ed. 1969).

59. S. ROSE, *THE AMERICAN PROFILE POSTER* (1986).

60. B. LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987).

also tells us something about educational background. A doctor's level of education is vastly different from that of a professional wrestler, even though both may earn \$200,000 annually.

An occupational approach, however, has its limitations. Occupational status can be a misleading indicator of income level. For example, a Legal Aid attorney may earn only \$18,000 a year; a dentist \$25,000. These salaries ordinarily cannot provide or "buy into" a middle-class lifestyle: comfort, security, a nice home, a late model car, an exciting annual vacation, and, in general, a stable, even thriving existence. Yet, a plumber earning \$60,000 a year could easily afford such a lifestyle.

Because income level dictates the type of lifestyle an individual or family can afford, many scholars believe that individual or family income is the most important determinant of socioeconomic status. These scholars use income as the primary measuring stick for middle-class, working-class, and underclass position. Sociologist Robert Hill and economist Andrew Brimmer are among leading Black scholars who take an income approach in defining the Black middle class. For Hill, the Black middle class consists of individuals with annual incomes between \$20,000 and \$50,000. For Brimmer, it consists of families with annual incomes between \$25,000 and \$50,000.⁶¹

Besides the fact that Hill's and Brimmer's income ranges may be too low if taken as national averages, an income approach is itself problematic. Fundamentally, it provides little information about occupational status, earnings stability or potential, and educational background. For example, a young business lawyer who earns \$50,000 a year, a janitor who moonlights as a taxicab driver and has a combined annual income of \$50,000, a high school teacher who earns \$50,000 a year after 20 years on the job, and a family in which the husband factory worker and wife office cleaner have a combined annual income of \$50,000 all have the same middle-class income but vastly different occupations, job security and mobility, future earnings potential, and educational background.

Yet each of these individuals and families has the ability to live the American Dream of a stable, comfortable lifestyle. Income is essential to having this ability. The fact that individuals and families from different occupations and educational backgrounds can buy into middle-class status simply means that there are many ways in

61. See *The New Black Middle Class*, EBONY, Aug. 1987, at 32.

which one can reach Nirvana in this country. Even an actor can become President of the United States.

This article, then, takes an income approach in defining socioeconomic classes in Black society. But I am less concerned with the numbers themselves than with what the numbers mean. When I use the terms "Black middle class," "Black working class," and "Black underclass," I am referring mainly to a set of socioeconomic characteristics a Black household (individual or family) normally possesses at a particular income range. I shall specify exactly what those characteristics are, including occupational status, as I move from class to class beginning here with the Black middle class.

According to the Bureau of Labor Statistics, most American households with an annual household income of about \$45,000 - \$85,000 live a stable, comfortable lifestyle — that is, a middle-class lifestyle. A household within this income range usually is able to own a home, drive a late model automobile, have a complete line of household appliances — microwave oven, VCR, and so on — and have savings or investments. Typically, at least one parent is a professional or business manager, and both parents work.⁶²

Black households within this income range have the following specific characteristics.

43 percent of the households consists of intact families, of which an equal percentage of the husbands ($\frac{1}{3}$) are employed either as semi-skilled or unskilled blue-collar or service workers, professionals, or managers; and an equal percentage of the wives ($\frac{1}{3}$) either keep house, are employed in clerical positions, or are professionals;⁶³

14 percent of the households are female-headed, and the household head is likely to be employed as a semi-skilled or unskilled blue-collar or service worker;⁶⁴ and

the remaining characteristics (which accounts for 43 percent of the households) are either not available or are scattered throughout other categories (male-headed families, single women, and single men) in percentages too small to report.⁶⁵

Based on a \$45,000 - \$85,000 income range, eight percent of Black Americans are middle class, compared to twenty-one percent of White Americans. Part IV of this article demonstrates that the

62. Much of the raw data that forms the basis of my statistical assertions on class characteristics comes from the Bureau of Labor Statistics and have been assembled in Rose's book, *AMERICAN PROFILE*, *supra* note 59. Rose discusses the "shrinking middle class" at *id.* 9-13. See also *id.* at 8, 22.

63. See *id.* at 22.

64. *Id.*

65. *Id.*

Black middle class is the largest segment of Black society, and that the White working class is the largest segment of White society. Part V shows that the Black underclass is the second largest stratum of Black society, and that the White underclass is the smallest component of White society. The size of classes in Black and White society breakdown as follows:

<i>Class</i>	<i>Black</i>	<i>White</i>
Underclass	37 percent	16 percent
Working Class	55 percent	63 percent
Middle Class	<u>8 percent</u>	<u>21 percent</u>
Total	100 percent	100 percent

Unfortunately, these statistics only add to the inconsistencies in published reports on the size of Black classes. Professor Landry, for example, asserts that forty-four percent of all Black workers are in the middle class. That such inconsistencies exist should not be surprising when one is mindful of the various factors that can go into each statistical conclusion. It makes a difference that Professor Landry focuses on occupational status and that I concentrate on income; that many of his occupational categories (such as, sales and clerical workers) are excluded by my income range; and that he limits his study to Black workers whereas I look more broadly at Black households. Likewise, it is a matter of consequence that sociologist Hill and economist Brimmer use lower income ranges than do I, even though each of us takes an income approach.

The critical point to observe, however, is the extent to which the studies are internally consistent in the factors used to compare socioeconomic classes cross-racially. One finds consistency here and, more tellingly, a oneness in the conclusions reached about the lot of middle-class Blacks in juxtaposition with that of middle-class Whites. Each study concludes that since the 1960s, the Black middle class has made plenty of progress but continues to lag behind the White middle class. Color remains a significant barrier in a middle-class Black's chances for sustained happiness and worldly success.⁶⁶

Nowhere is this assessment more evident than in the employment arena. Here, middle-class Blacks face a congeries of employment

66. In addition to *The New Black Middle Class*, see *supra* note 60, and the special issue of *Ebony* on the Black Middle Class see *supra* note 61, other studies include: *The Black Middle Class*, BUS. WK., Mar. 14, 1988, at 62; *The New Black Middle Class (Part I)*, Focus, Sept. 1987 at 5; *The New Black Middle Class (Part II)*, Focus, Oct. 1987, at 6. Professor Landry's research forms the basis for many of these studies.

problems that threaten to pull them down, returning some to the working class and perhaps others even lower. And here, middle-class Blacks face racial subordination through the dictates of formal equal opportunity.

B. *The Subordination Question*

The subordination question is in reality a two-fold question: does formal equal opportunity (racial omission or racial integration) engender incidents of racial subordination (situations in which low or no priority is given to Black civil rights interests) and, if so, has such racial subordination contributed to the American race problem (socioeconomic vulnerability within Black society) since the 1960s? Before responding to this question class by class, it may be useful to clarify the dominant socioeconomic problems facing each segment of Black society. Several specific problems plague the Black middle class.

1. *Dominant Class Problems*

So much is made about affirmative action these days, that little attention is given to what happens to a Black (whether or not a beneficiary of affirmative action) *after* he or she is hired. Scratch the surface of this peachy world of employment and one finds no dearth of racial problems hounding the Black corporate manager or professional. Loneliness, disaffection, stress and hypertension (or "John Henryism"), "complex racial discrimination" (sophisticated or unconscious racial discrimination frequently accompanied by nonracial factors), and *de facto* segregation in high-level jobs are the principal problems. Of these, employment discrimination and segregation are the most serious class problems.

As a society of one or a few, any person is almost by definition lonely. Feelings of loneliness are often heightened by a multitude of maladroitness professional and semi-social interactions with well-meaning White colleagues. An awkward remark ("Blacks seem to have a natural ability for basketball" or the traditional "Some of my best friends are Black") or a racist joke can be very poignant. To survive in an environment that neither understands nor fully supports them, some Blacks have adopted a policy of what the French call *soyez méfiant* ("be mistrustful"). This survival policy — a manifestation of racial sensibility within the Black middle class⁶⁷ — inevitably intensifies loneliness. Leon Lewis reflects on *soyez méfiant* in the following passage:

67. For a discussion of racial sensibility, see *infra* text accompanying notes 377-78, 391-96, 424-29.

Everything is different when you're [B]lack. It's amazing how the quality of one's life can be changed by what might happen, by what you think might happen and by what other people think might happen. Often I've been invited to cocktail parties, openings and other gatherings of a business or civic nature, and many times I've been the only [B]lack person in attendance. I can become very uncomfortable in that setting. My subconscious might start sending up smoke signals, and I think, say, 'What if that lady standing near me should suddenly scream?' Every eye would be on me, and I could be in a world of trouble. Why should a thought like that enter my mind? The lady doesn't look as if she is about to scream, but it has happened and who is to say it will never happen again?⁶⁸

Disaffection is another class problem. Like V. S. Naipaul living in the garden of the oppressor,⁶⁹ the Black corporate manager or professional, working in the same garden, can feel "unanchored and strange." A feeling of alienation can intensify in the face of racial hypocrisy within the work environment. Disgust and disillusionment can take hold when, in spite of the institution's professed concern for fair employment and meritocracy, qualified Blacks are overlooked ("they can't be found"), less-demanding standards are applied to White "favored sons," Black employees are paid less than comparably educated Whites, and Black employees must cope in a work environment in which policymaking and attitudes are controlled by Whites who are at best indifferent and at worst antagonistic to their needs. Expectations of racial congruity with which the Black employee might have entered the institution quickly wither away under the harsh light of life's realities.

Some Black corporate managers and professionals also suffer from hypertension caused by stressful attempts to adapt to a White-dominated work environment. Recent studies have validated this slice of the Black experience, long known to Blacks, and have also concluded that Black Americans generally suffer more hypertension than White Americans. High blood pressure strikes nearly twice as many Blacks as Whites, and with more devastating consequences. "Black hypertension victims suffer heart failure at twice the rate of [W]hite victims and have 12 to 18 times the kidney-failure rates. Hypertension also gives American Blacks the world's second highest death rate from strokes, after the Japanese."⁷⁰

"John Henryism," a term taken from the fictional Black

68. Lewis, *In On The Game*, N.Y. Times, Feb. 3, 1985, at 70.

69. V. NAIPAUL, *THE ENIGMA OF ARRIVAL* (A. Knopf ed. 1987).

70. Williams, *Stress of Adapting to White Society Cited As Major Cause of Hypertension in Blacks*, Wall St. J., May 28, 1986, at 35, col. 4. For more information on Black health, see, e.g., UNITED STATES BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 72, table 112 (106th ed. 1986).

strongman who died by pitting his sledge hammer against a steam drill, is frequently used to describe the syndrome of stress and hypertension within the Black middle class. "John Henryism is a manifestation of 'the struggle to get into the mainstream' and is characterized by a belief that one can triumph despite the odds."⁷¹ Unlike the aggressive "Type-A" personality, the John Henry personality "shows extreme patience and tends to suppress anger in order to deflect White hostility."⁷² Roger Wilkens, a Black lawyer and social commentator, reflects on his personal struggle with John Henryism:

I had always to be careful never to break the unstated rules that minimized my difference, the unspoken inferiority that I hoped my [White] friends would ignore. So I was quiet for the most part, waiting for situations to develop before I reacted, always careful, always polite and considerate.⁷³

One study traced John Henryism in a group of Black graduates of the Meharry Medical School in Nashville, Tennessee. This study covered a twenty-five-year period, and found that forty-four percent of the subjects developed hypertension. The fact that Black physicians normally practice under more stressful conditions than their White counterparts is, according to one observer, a major reason for the study's results. Black physicians have "traditionally practiced alone with limited finances and in situations where they were forced to struggle for patients and acceptance from peers."⁷⁴

Complex racial discrimination, certainly a contributor to John Henryism, is one of the greatest obstacles facing the Black corporate manager or professional.⁷⁵ Employment discrimination that is subtle, sophisticated, or unintentional is difficult enough to uncover, although its sting is as great as the old-fashion, overt brand of discrimination. Such employment discrimination is doubly difficult to unearth when it is accompanied by a nonracial factor.⁷⁶ A neutral factor provides a handy pretext for racial discrimination and can even blind the Black applicant or employee as to the true reasons behind the personnel action. Also, some courts have taken the posi-

71. Williams, *supra* note 70.

72. *Id.*

73. R. WILKENS, A MAN'S LIFE 54-55 (1982).

74. See Williams, *supra* note 70, at 35, col. 5.

75. See, e.g., J. FERNANDEZ, RACISM AND SEXISM IN CORPORATE LIFE: CHANGING VALUES IN AMERICAN BUSINESS (1981); Reibstein, *Many Hurdles, Old and New, Keep Black Managers Out of Top Jobs*, Wall St. J., July 10, 1986, at 25, col. 4; Hymowitz, *Many Blacks Jump Off The Corporate Ladder To Be Entrepreneurs*, Wall St. J., Aug. 2, 1984, at 1, col. 1; Hines, *When the Boss Calls You A. . . : Coping with the Intricacies of Corporate Racism*, BLACK ENTERPRISE, Mar. 1982, at 69; Rivlin, *Climbing the Legal Ladder: Some Kinds of Discrimination Die Hard*, A.B.A. UPDATE 28 (Fall 1981). See also F. DICKENS & J. DICKENS, THE BLACK MANAGER: MAKING IT IN THE CORPORATE WORLD (1987).

76. Accompanying nonracial factors may include the fact that the Black applicant has less traditional qualifications than White applicants or the fact that a discharged Black employee violated an inconsequential company policy.

tion that a nonracial factor contributing to the Black applicant's or employee's disparate treatment shields the employer from liability.⁷⁷

The presence of complex racial discrimination within America's top jobs is manifested in several ways. Racial wage gaps and the collective experiences of middle-class Blacks are among the most compelling indicators of complex racial discrimination. Taken together, these indicators strongly suggest that complex racial discrimination is more than an intermittent phenomenon. They offer at least *prima facie* proof that complex racial discrimination is regular and systemic in places of middle-class employment — corporations,⁷⁸ law firms,⁷⁹ law faculties,⁸⁰ newsrooms,⁸¹ the TV industry,⁸² and so on.

In spite of dramatic improvements in Black occupational status since the 1960s — mainly the result of improvements in education and affirmative action⁸³ — wage gaps between comparably educated Black and White males still exist. According to a Rand Corporation study, "While these racial wage differences narrowed substantially over time [down from 50 to 55 percent in 1940] they remained at levels of 70 to 80 percent in 1980. These within-education wage differentials should be contrasted to the aggregate ratios of 43 percent in 1940 and 73 percent in 1980. . . . That contrast informs us that education will play a significant role in explaining the racial wage gap. *However, it also warns us that simply equalizing the number of years of schooling alone would leave a sizeable racial wage gap.*"⁸⁴

Along with racial wage gaps, the observations of Blacks and

77. See *infra* text accompanying notes 168-88 for a discussion of causation in Title VII litigation.

78. See, e.g., BLACK ENTERPRISE, Apr. 1987, at 39; BUS. WK., Feb. 20, 1984, at 104. See also Dingle, *Will Black Managers Survive Corporate Downsizing?*, BLACK ENTERPRISE, Mar. 1987, at 49.

79. See, e.g., Burke, *3,700 Partners. 12 Are Black.*, NAT'L L.J., July 2, 1979, at 1; Smith, *The Invisible Lawyer*, BARRISTER, Fall 1981, at 42.

80. See, e.g., Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 L. & INEQUALITY J. 101, 105-06 (1987); Bell, *The Price and Pain of A Racial Perspective*, STAN. L. SCI. J. 5 (1986); Brooks, *supra* note 3, at 33.

81. See, e.g., TIME, Nov. 29, 1982, at 90. Levine, *The Plight of Black Reporters: Why 'Unconscious Racism' Persists*, TV GUIDE, July 25, 1981, at 22.

82. See, e.g., Hays, *Capturing the Black Experience*, TV GUIDE, Nov. 29, 1986, at 10.

83. See, e.g., RAND RPT., *supra* note 37, at xx-xxi, 85-91; Bergmann, *An Affirmative Look at Hiring Quotas*, N.Y. Times, Jan. 10, 1982, § 8 (Bus.), at 3, col. 1. See also N.Y. Times, Sept. 18, 1983, § 1 (Main), at 12, col. 1; *Id.*, Dec. 13, 1981, § 4 (Wk. in Rev.), at 2, col. 2.

84. RAND RPT., *supra* note 37, at 23 (emphasis added).

Whites in the trenches portray a clear picture of complex racial discrimination. The numbers and narratives reinforce each other. The numbers support a suspicion of racial discrimination Blacks have held for a long time.⁸⁵ Collectively, the personal perceptions enhance the view that complex racial discrimination may offer the best explanation for racial wage gaps and the paucity of Blacks in middle-class jobs.

Glegg Watson and George Davis, co-authors of *Black Life in Corporate America: Swimming in the Mainstream*⁸⁶ and former co-teachers of a course on multicultural management at the Yale School of Management, believe that complex racial discrimination is prevalent in corporate America and has had a considerable effect on Blacks. Watson asserts that "Black advancement to the top of the corporate pyramid has moved beyond the preparation-and-qualification question and on to a team-acceptance question."⁸⁷ Davis is more explicit: "Race is not mentioned much in corporate America, yet it has a big effect on people's careers because management is teamwork — and in teamwork you've got to have a high comfort level among the team members."⁸⁸ Other Blacks share these views. "By and large, it's a matter of chemistry," says a Black partner at Heidrick & Struggles,⁸⁹ the nation's largest executive search firm. "Most companies want a guy who is 6-foot-2, blue-eyed, and blonde — what we call the guy who steps out of the IBM catalog. Blacks generally just don't fit that description."⁹⁰ Another Black, who is chairman of a Black management firm, notes that "Headquarters people, who have seen the [B]lack manager over time and know that he is competent and articulate, would have no problem, but what they're afraid of is how the guys in Kansas will take this [B]lack executive when he comes to town."⁹¹ Some Blacks believe even White executives who feel comfortable with Black managers are reluctant to place Blacks in line positions that expose them to racist White managers who may jeopardize the Black manager's success.⁹²

A 1984 survey of corporate personnel executives by Business Week magazine confirms these observations. Even in companies with a strong commitment to affirmative action, Black managers were

85. As one Black lawyer has stated in reference to the low percentage of Black partners in large law firms, "We have long felt that the large, established firms discriminate against minority attorneys, but we haven't had the statistics until now." Burke, *supra* note 79, at 1.

86. G. WATSON & G. DAVIS, *BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM* (1982).

87. *BUS. WK.*, Feb. 20, 1984, at 105.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* See also sources cited *supra* note 75.

perceived as "different." "This 'difference,' " the study concluded, "raises questions about the unacknowledged cultural and racial barriers to the realm of senior management, which is largely [W]hite."⁹³

Much is the same in the nation's newsrooms. Max Robinson, a former co-anchor of ABC News and the first Black anchor of a national news program, recalls that on the day

Ronald Reagan was crowned and our hostages came home, I watched from the sidelines, because ABC chose not to include me in the coverage of either event, even though I [was] the national-desk anchor. . . . [I] looked around and found that . . . suddenly [B]lack people disappeared. In an orgy of [W]hite patriotism, [B]lack people would interfere with the process and point out the reality Americans didn't want to face.⁹⁴

Other Blacks in network news concur in Mr. Robinson's general charge of racial discrimination. Some also charge that not only their careers, but also balanced network coverage of Black society suffers because Blacks are kept out of decisionmaking positions. As Richard Levine reports in his article, *The Plight of Black Reporters: Why 'Unconscious Racism' Persists*:

Although the overt racism that simply excluded minorities from network news jobs has long since ended, many [B]lacks feel that an 'unconscious racism' . . . on the part of their [W]hite superiors handicaps both the coverage of the [B]lack community and their own careers. . . . No matter how many [B]lack reporters appear on-camera, [W]hite producers and executives are running the show. . . .⁹⁵

The first major poll of minority journalists conducted by a news organization is also replete with findings of complex racial discrimination. Of those surveyed, 75 percent felt that they did not have "the same chances for promotion as [W]hite colleagues"; 51 percent said that their editors "believe that minority journalists, as a group, are less skilled" than Whites; and 10 percent said that they were "told openly that race was the reason they were refused certain assignments, notably on sensitive subjects including school desegregation." One respondent said: "I believe [White editors] expect less from minority staffers, and only if we do more will we be seen as equal."⁹⁶

93. BUS. WK., *supra* note 81, at 105.

94. Levine, *supra* note 81, at 22.

95. *Id.*

96. TIME, Nov. 29, 1982, at 90. In *EEOC v. New York News, Inc.*, 81 Civ. 337 (S.D.N.Y. 1987), a jury in the Southern District of New York returned a verdict in favor of the plaintiffs who charged that between 1979 and 1982 the New York Daily News denied promotion and desirable assignments to four Black journalists. Testimony described a newsroom where editors tossed around such epithets as "nigger" and "spic." Although these acts of racism seem undisputable, the jury found discrimination in only

If the 1980s is the "Cosby Decade," it is also the decade of complex racial discrimination in the TV and motion picture industry. There has always been employment discrimination in Hollywood. "Only this new strain is more subtle and discreet."⁹⁷ Some Black actors believe that this new strain of employment discrimination is more "dangerous" than the overt form Blacks have experienced under Jim Crow, because "those who are guilty of [subtle] discrimination don't even realize it." Even some of the performers in the hugely-successful 1977 TV miniseries *Roots* have encountered racial barriers. Ben Vereen, for example, has experienced racial discrimination under the guise of artistic expression: "I'll want to read for a role I like, but they'll say, 'You can't play that, you have to play the janitor. We want a [W]hite actor for that part.'"⁹⁸ Another *Roots*' star adds: "If you had been a [W]hite actor, and you were in the most popular show in television history, you would have had — at the very least — a job."⁹⁹

It is difficult to find work environments in which complex racial discrimination is more pronounced than in American law firms and law schools. A 1987 survey by the Minority Employment Committee of the Los Angeles County Bar Association provides insights into the plight of Black lawyers in Los Angeles and other cities. The survey concludes that "[a] capable minority attorney might not be hired by some Los Angeles law firms, if the firms' partners believe their clients would not work with a non-[W]hite lawyer — or that a minority attorney would not fit in at the firm. . . ."¹⁰⁰ A named partner of one firm stated that "[t]he client is not always as interested in quality as with someone who fits the mode that they [sic] feel comfortable with. Rather than to have someone who might be sharp and a [B]lack, they would rather have someone who fits the profile."¹⁰¹

A similar situation exists in law schools. Some White law professors exhibit a predisposition to assess Black performance in a negative or hypercritical fashion; an intolerance for even small mistakes

12 of the 23 incidents on which testimony was taken, again demonstrating how difficult it is to prove intentional discrimination today. See N.Y. Times, April 19, 1987, § 4 (Wk. in Rev.), at 7, col. 1.

97. Hays, *supra* note 82, at 11.

98. *Id.*

99. *Id.*

100. Becnel, *Minority Lawyers: Some Firms Fear Client Objections*, L.A. Daily J., May 11, 1987, at 1, col. 6.

101. *Id.* Of the 400 questionnaires that were mailed out, there were only 35 responses. One bar committee member said there was no way to determine whether the small number of responses accurately reflected the prevailing attitudes of law partners in Los Angeles, because, as far as he knew, this was the first survey of its kind undertaken by the bar. *Id.* For an excellent discussion of racism in the legal profession, see Diamond, *A Trace Element in the Law*, A.B.A. J., May 15, 1987, at 47-48. See also Weisenhaus, *White Males Dominate Firms: Still a Long Way to go For Women Minorities*, NAT'L L.J., Feb. 8, 1988, at 1.

committed by Blacks; a proclivity toward denying Blacks the deference or presumption of competence normally accorded to White male law professors. Like other White professionals, some White law professors, in short, possess a set of negative biases against Blacks either consciously or unconsciously.¹⁰²

The existence of such an anti-Black mindset is suggested by several facts. Two are statistical — the low percentage of¹⁰³ and high turnover rate for minority law teachers.¹⁰⁴ There are also the observations of minority and female law teachers. Based upon years of experience, some minority law professors have concluded that their White male colleagues seem to believe that only a “superstar” minority should be hired, promoted, or tenured.¹⁰⁵ Female law professors, not being entirely immune from negative prejudging, have similarly noted that law faculties are “only looking for the [female] superstars.”¹⁰⁶

Despite racial wage gaps, other statistics, and scores of personal observations, some might demand more “specific” evidence of employment discrimination. Some may even be inclined to dismiss any claim of racial discrimination, no matter how complex such discrimination is claimed to be, as “wild speculation” while others might call it “over-reaction.” In fact, it may never be possible to pinpoint the existence of racial discrimination in places of high employment in a manner that is sufficiently “objective” or “conclusive” for some Americans.

Still others may demur. They may insist that society has come too far in race relations for Blacks, especially middle-class Blacks, to “quibble” about racial discrimination in the nation’s top jobs. Why not, they might ask, concentrate on society’s real social problems — such as the problems of poor Blacks — rather than on the pseudo social problems of affluent Blacks?

These criticisms miss the main point: racial discrimination, besides being unlawful, is harmful. Whether complex or Jim-Crow style, racial discrimination harms society by diminishing society’s humanity;

102. See generally Brooks, *supra* note 80, at 107-08. Symposium, *The 1985 Minority Law Teachers' Conference*, 20 U.S.F. L. REV. 383, 576 (1986).

103. For example, of the 6,660 full-time law professors in the 1985-86 academic year, only 6.5 percent were minorities. Brooks, *supra* note 80, at 105.

104. Of the 351 full-time minority law professors teaching during the 1979-80 academic year, only 201 remained in the profession during the 1985-86 academic year. *Id.*

105. Goldfarb, *Education Without Representation*, 9 STUDENT LAW. 11 (May 1981).

106. Rivlin, *supra* note 75, at 49.

and it harms Blacks by diminishing their human dignity. Professor Derrick Bell's reflection on an incident of racism at Stanford Law School in which he was involved is most instructive on the latter point.¹⁰⁷

The fact of my exclusion from the dialogues that must have taken place before so radical a remedy for student upset was adopted was a denial of my status as a faculty member and my worth as a person every bit as demeaning and stigmatizing to me as the Jim Crow signs I helped remove from public facilities across the South two decades ago.¹⁰⁸

If complex racial discrimination is one of the most serious problems facing the Black middle class, the problem of racially segregated top-level jobs commands equal attention. Racially segregated, or underrepresented, workforces give evidence of complex racial discrimination. Such workforces also invoke strong images of yesteryear's racial hierarchy, which, like racial discrimination, is harmful to all Americans.

Images of a racial caste system derived from racially imbalanced workforces harm White and Black Americans in several ways. These images can ignite latent racism in some Whites, particularly the young or uninitiated. For example, the paucity of Black faculty and the abundance of Black unskilled workers at major White colleges and universities may have contributed to the upsurge of campus racism during the 1980s. Jim Crow images may also leave indelible doubts in the minds of other Whites about the caliber of work Blacks are capable of performing. Most importantly, these images create psychological barriers for Blacks. Places in which no or few Blacks work convey negative messages to Blacks, especially the young: Blacks are unwelcomed; Blacks can't perform at this level.¹⁰⁹ As Time essayist Lance Morrow has put it:

People become only what they can imagine themselves to be. If they can only imagine themselves working as menials, then they will probably subside into that fate, following that peasant logic by which son follows father into a genetic destiny. If they see other [B]lacks become mayors of the largest cities, become astronauts, become presidential candidates, become Miss Americas and, more to the point, become doctors and scientists and lawyers and pilots and corporate presidents — become successes — then young [B]lacks will begin to comprehend their own possibilities and honor them with work.¹¹⁰

107. See Bell, *supra* note 80.

108. *Id.* at 5.

109. The psychological effects of segregative occurrences on Blacks are well documented and have played an essential role in the development of race law. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493 n.11 (1954). See also *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 450 (1986) ("Affirmative action 'promptly operates to change the outward and visible signs of yesterday's racial distinctions and, thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.'" quoting *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)).

110. Morrow, *The Powers of Racial Examples*, TIME, Apr. 16, 1984, at 84.

Finally, Blacks isolated in predominantly White environments may experience feelings of loneliness, disaffection, and John Henryism, which can adversely affect their performance.

Notwithstanding these deleterious social consequences, images of Jim Crow abound in places of high-level employment. While the number of Black corporate managers and professionals has increased with the general rise in Black occupational status since the 1960s, Blacks are still underrepresented in these vital occupations well into the 1980s. According to the federal government's Equal Employment Opportunity Commission (EEOC), Blacks comprised 4.7 percent of all corporate managers and 4.5 percent of all professionals in 1985.¹¹¹ In individual professions, Blacks held less than 1 percent of the partnerships at the nation's largest law firms in 1987,¹¹² 3.9 percent of the fulltime teaching positions in the nation's law schools in the 1985-86 academic year,¹¹³ 6.3 percent of the nation's investment banking jobs in 1985, two years prior to the Wall Street purge of Black investment bankers,¹¹⁴ and something less than 5.5 percent of newspaper editorial posts in 1982.¹¹⁵

Are racial wage gaps and the low percentages of Black corporate managers and professionals mainly products of nonracial factors? The "experience factor" — the relatively brief time "qualified" Blacks have been on the job — can affect racial wage gaps. And layoffs stemming from the October 1987 stock market crash, mergers and acquisitions, and general corporate cost-cutting seem to be the most visible reasons for declines in the number of Black corporate managers during the 1980s.¹¹⁶ But these factors do not lessen the explanatory power of race.

111. Dingle, *supra* note 78, at 51.

112. Weisenhaus, *supra* note 101. See also Diamond, *supra* note 101, at 46. According to Roderick McLeod, chairman of the A.B.A.'s Minorities in the Profession Committee, "By and large, minorities are very under-represented in all segments of the [legal] profession—in all size firms, corporate legal departments and government." *Id.* at 47. See also Marcotte, *The Changing of the Guard*, A.B.A. J., May 15, 1987, at 60.

113. See Association of American Law Schools Executive Director to Deans of Member Schools, Memorandum No. 86-57 (Sept. 5, 1986).

114. *Blacks and the Wall St. Purge*, NEWSWEEK, Feb. 1, 1988, at 38. Although investment banking firms refuse to comment on how many Blacks were laid off after the October 1987 stock market crash, it is estimated that as many as a third to a half of the Blacks were laid off. One insider at Solomon Brothers says that roughly two-thirds of the firm's Black bankers were fired after the crash. *Id.*

115. TIME, Nov. 29, 1982, at 90. 5.5 percent of newspaper editors are minority. Blacks, therefore, are less than 5.5 percent of newspaper editors.

116. See, e.g., Dingle, *supra* note 78; Deutsch, *The Ax Falls on Equal Opportunity*, N.Y. Times, Jan. 4, 1987, § 3 (Bus.), at 1, col. 2; Wall St. J., July 7, 1986, at 25, col. 4; *Blacks and the Wall St. Purge*, *supra* note 114, at p. 38.

When one pierces the surface of employment dynamics, it is hard not to find racial factors at work. For example, Black corporate managers hired during the 1960s and 1970s were herded into personnel, public or governmental relations, municipal finance, affirmative action compliance, and similar soft positions. While this type of hiring helped the corporation's affirmative-action profile, it did not place Blacks on the fast track to the company's highest-paying and most secure jobs. Rather, it left Blacks at risk during times of financial crisis.¹¹⁷ In addition to this form of tokenism, Blacks are typically left out of corporate social inner-circles and, consequently, denied the benefits of the old-boy network.¹¹⁸ Also, half of all managerial and professional jobs Blacks obtained between 1960 and 1976 were with local, state, and federal governments.¹¹⁹ Even in the 1980s, Black college graduates are 1.5 times more likely to secure public sector employment than private sector employment.¹²⁰ Further, these public sector positions are themselves likely to be soft. Usually they involve some aspect of social program management. Quite naturally, cutbacks in these programs will have a disparate impact not only on Black recipients (normally underclass or working-class Blacks) but also on Black managers (the Black middle class). It is not surprising then that although Blacks comprise about twenty percent of all public employees, they suffer some forty percent of public-employee layoffs.¹²¹

Ultimately, it might not be important whether racial wage gaps or the low percentages of Black corporate managers and professionals are caused by racial or nonracial factors. The fact is they exist, and something must be done to prevent the creation of Jim Crow images. The American Bar Association saw the situation this way in 1986 when, without finding an explicit racial or nonracial antecedent, it stated that "the lack of opportunity for minorities in the legal profession persists," and then proceeded to adopt a specific plan for resolving this problem.¹²²

Complex racial discrimination and racially segregated top jobs are the dominant problems facing the Black middle class. They are parents to loneliness, disaffection, and John Henryism. Complex racial discrimination and racially segregated top jobs do not exist in a vacuum. They are linked to the current regime of interracial relations and, more particularly, to that regime's subordinating features.

117. BUS. WK., Feb. 20, 1984, at 104.

118. TIME, Dec. 6, 1983, at 53.

119. Yagoda, *Movin' on Up*, PHILA. MAG., Nov. 1983, at 176, 180.

120. BUS. WK., Feb. 20, 1984, at 104.

121. Yagoda, *supra* note 119, at 180.

122. A.B.A. J., Apr. 1, 1986, at 18.

2. *Racial Subordination*

Through its tenet of racial omission,¹²³ formal equal opportunity subordinates the Black middle class. Racial subordination of the most stable segment of Black society arises mainly within the employment context. The strict scrutiny test and judicial treatment of statutory antidiscrimination law give low priority to the employment interests of middle-class Blacks and, relative to their White counterparts, force them to endure a disproportionate amount of employment discrimination, segregation, and other employment hardships.

a. *Strict Scrutiny Test*

The strict scrutiny test is nowhere to be found in the Constitution or in its legislative history. It is a legal doctrine made up entirely by judges. The strict scrutiny test comes into play when federal courts are called upon to review government-sponsored decisions challenged as violating the equal protection clause of the Fourteenth Amendment or the equal protection component of the Fifth Amendment's due process clause. The former constitutional provision protects against state actions¹²⁴ and the latter against federal actions.¹²⁵

Now a fixture in constitutional law, the strict scrutiny test is the legal system's primary means of implementing formal equal opportunity's racial omission tenet. It commands the omission of race in the government's formulation of laws and public policies. More importantly, it operates to strike down, as a denial of equal protection of the laws, any governmental activity or legislation that is either predicated upon an explicit racial or other "suspect classification"¹²⁶ or violative of a "fundamental personal interest."¹²⁷ The act under scrutiny is saved from judicial strangulation only if the government can meet a two-fold burden. First, the classification must be justified

123. See *supra* text accompanying notes 33-34 for an explanation of the concept of racial omission.

124. See, e.g., *United States v. Paradise*, 480 U.S. 149, 166 (1987) (cases cited therein). See also *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

125. See, e.g., *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 479-80 (1986) (cases cited therein). See also *Bolling v. Sharpe*, 347 U.S. 497 (1954).

126. See, e.g., *McDonald v. Board of Elec. Comm'rs.*, 394 U.S. 802, 807 (1969). See generally P. POLYVIU, *THE EQUAL PROTECTION OF THE LAW* (1980); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

127. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Fundamental personal interest include the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the right to vote, *Reynolds*, 377 U.S. 533, and the right to interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

by a “compelling governmental interest.” Second, the means chosen to achieve that purpose must be the least restrictive, narrowly-tailored means available.¹²⁸

As applied by the Supreme Court, the strict scrutiny test sets up a standard of judicial review so rigorous as to be fatal to most applicable legislative acts. The first burden is particularly difficult to meet. Protecting national security¹²⁹ and remedying past institutional or individual discrimination¹³⁰ are among the few (if not the only) times the government has been able to demonstrate a compelling governmental interest to the Supreme Court’s satisfaction.

The Court, however, has attempted to balance the interventionist proclivity of the strict scrutiny test with a more deferential form of judicial review. Legislative acts not predicated on a suspect classification or violative of a fundamental personal interest — which is where the great majority of legislative acts fall — do not offend constitutional equal protection if they can be rationally related to a legitimate governmental purpose. The so-called “rational basis test” provides the widest degree of judicial comity to even speculative legislative judgments.¹³¹

Both the strict scrutiny test and the rational basis test are so predictable that the judicial outcome is virtually determined by the type of legislation under review. Legislation involving a suspect classification or a fundamental personal interest most likely will not survive constitutional scrutiny; whereas legislation not involving either of these categories probably will be sustained. The Supreme Court’s analysis for equal protection claims is in this sense outcome-determinative.¹³²

Middle-class Blacks find the strict scrutiny test to be problematic because it quashes voluntary attempts to promote real equal employment opportunity in places of high employment. The test, in a word,

128. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (Powell, J., concurring); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). See also *McLaughlin v. Florida*, 397 U.S. 184 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Some Supreme Court Justices have proposed alternative levels of judicial scrutiny. See *infra* note 133 and accompanying text.

129. See *Korematsu v. United States*, 323 U.S. 214 (1944).

130. See *United States v. Paradise*, 480 U.S. 149, 166 (1987) (cases cited therein).

131. See, e.g., *McDonald v. Board of Elec. Comm’rs.*, 394 U.S. 802, 809 (1969) (“Legislatures are presumed to have acted constitutionally. . . .”). Note, *supra* note 126.

132. Explicit gender-based classifications are not suspect classifications and, hence, are not subject to strict scrutiny. Neither are they reviewed under the rational basis test. Rather, the Supreme Court employs a “middle-tier” or an “intermediate level” of scrutiny. Under this standard, the classification in question must serve important governmental objectives and must be substantially related to the achievement of those objectives. See *Craig v. Boren*, 429 U.S. 191 (1976). See also G. GUNTHER, *CONSTITUTIONAL LAW* 642-64 (11th ed. 1985); C. DUCAT & H. CHASE, *CONSTITUTIONAL INTERPRETATION* 692, 861-71 (3d ed. 1983).

commands the omission of race at the *wrong time*. Except in a very limited situation, it enjoins the public sector's use of race-conscious employment policies or practices that engender racial inclusion. In so doing, it treats employment policies and practices resulting in racial exclusion *pari passu* with socially-beneficial ones.

The limited circumstance under which the strict scrutiny test permits governmental bodies to use an explicit racial classification is clear beyond peradventure. Race can only be used if it achieves a compelling governmental purpose. So far, a racial classification designed to remedy a public employer's prior racial discrimination is the only purpose the Supreme Court finds compelling in the employment context. As the Court itself has stated: "It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination."¹³³

Establishing an employer's prior racial discrimination is no easy task. Absent the unlikely event that an employer (even in connection with the voluntary use of a racial classification¹³⁴) either admits to its own racial discrimination or leaves behind smoking-gun evidence, the victim's only chance of proving prior racial discrimination is by proving that the employer violated constitutional or statutory antidiscrimination law. If the asserted violation involves the equal protection clause, the victim will probably be defeated by the intent test.¹³⁵ If the asserted violation involves a federal statute rather than the Constitution, the victim will have to surmount enormous barriers

133. *Paradise*, 480 U.S. at 166. While agreeing that "some elevated level of [judicial] scrutiny is required when a racial or ethnic distinction is made for remedial purposes," *id.*, some members of the Court have proposed alternative levels of judicial scrutiny. Justices Marshall, Brennan, and Blackmun, for example, would allow racial classifications that serve "important governmental objectives" and are "substantially related to the achievement of those objectives." *Wygant*, 476 U.S. at 301 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978)). Justice Stevens would permit the use of race if the public interest vindicated by such use and the means employed to implement that interest justify the resulting adverse effects on the disadvantaged group. *Id.* at 313-14. None of these alternative levels of judicial scrutiny have replaced the strict scrutiny test as the dominant mode of constitutional analysis for racial classification. The use of race to remedy the defendant's prior discrimination is permissible under any of the alternative modes of constitutional analysis. See generally *Paradise*, 480 U.S. 166, n.17.

134. When an employer voluntarily sets up race-conscious employment practices or policies, it is usually willing to admit to conspicuous racial or sexual imbalance in its workforce but quite unwilling to admit to its own discrimination, because that, in effect, would be admitting to a violation of the law. See, e.g., *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 619-26 (1987); *United Steelworkers of America v. Weber*, 443 U.S. 193, 209 (1979).

135. See *infra* text accompanying notes 236-51 for a discussion of the intent test.

created by Title VII of the 1964 Civil Rights Act, to which I shall turn in due course.

In short, the strict scrutiny test — specifically, the Supreme Court's color-blind perspective and narrow interpretation of compelling governmental purpose — subordinates the Black middle class in the employment context. It gives low priority to the Black middle class' interest in equal employment opportunity. And, it does so by making it extremely difficult for a public employer to voluntarily use racial classifications for the purposes of assisting qualified Blacks in catching up with their White counterparts, in dismantling psychological and institutional barriers erected by past employment practices, or otherwise in overcoming the present-day effects of prior subordinating systems.

Such racial subordination contributes to complex racial discrimination and segregation in high employment by prolonging these conditions. Making it extremely difficult for employers or Blacks to use a device that can purge complex racial discrimination and segregation from the workplace perpetuates rather than diminishes these socioeconomic problems. Given the difficulties of proving a violation of constitutional or statutory antidiscrimination law, voluntary racial preferences may be the only way to effectively counteract complex racial discrimination and segregation in employment. Even the Supreme Court recognizes that "affirmative race-conscious relief may be the only means available 'to assure [true] equality of opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'"¹³⁶ Reports issued since the 1960s by the Department of Labor,¹³⁷ the United States Commission on Civil Rights,¹³⁸ the Rand Corporation,¹³⁹ and others¹⁴⁰ support this conclusion, and go on to assert that racial preferences have launched many qualified Blacks on successful careers they otherwise would not have obtained or dared to pursue. Placing barriers in the path of voluntary efforts to promote racial inclusion necessarily accommodates, extends, and perhaps even intensifies racial exclusion — the very condition these voluntary efforts are so capable of reversing.

136. *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 450 (1986) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). See also *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 499 (4th Cir. 1981); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 943-45 (10th Cir. 1979); *Rios v. Enterprise Ass'n. Streamfitters Local 938*, 501 F.2d 622, 631-32 (2d Cir. 1974); *Edwards & Zaretsky, Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 9 (1976).

137. See N.Y. Times, Sept. 18, 1983, § 1 (Main), at 12, col. 1.

138. See N.Y. Times, Dec. 13, 1981, § 4 (Wk. in Rev.), at 2, col. 2.

139. See RAND RPT, *supra* note 37, at 85-91.

140. See, e.g., Bergmann, *An Affirmative Look at Hiring Quotas*, N.Y. Times, Jan. 10, 1982, § 3 (Bus.), at 3, col. 1.

b. Title VII

Title VII of the 1964 Civil Rights Act,¹⁴¹ is the nation's major antidiscrimination law in the employment context. Its key antidiscrimination section, Section 703(a), provide classic illustration of the manner in which Congress has decided to implement the racial omission tenet in federal civil rights laws:

It shall be an unlawful employment practice for an employer —
 (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .¹⁴²

Although Congress made employment discrimination on the basis of race,¹⁴³ color,¹⁴⁴ sex,¹⁴⁵ religion,¹⁴⁶ or national origin¹⁴⁷ illegal under Title VII, it did not define the word "discrimination." This omission may have been deliberate. Congress may have felt that the task of defining such a complex term is better left to the courts.

Responding to this challenge, the Supreme Court devised two distinctly different definitions of employment discrimination: disparate treatment (requiring proof of racial motivation)¹⁴⁸ and disparate impact (requiring no such proof).¹⁴⁹ Both concepts were defined succinctly by the Supreme Court in *Teamsters v. United States*.¹⁵⁰

A 'Disparate treatment' such as is alleged in the present case is the most

141. 42 U.S.C. §§ 2000 to 2000e-17 (1982).

142. § 703(a), 42 U.S.C. § 2000e-2(a).

143. See, e.g., *Slack v. Havens*, 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

144. Although an impermissible basis listed in § 703(a), color is generally treated as indistinguishable from race. See EEOC Dec. No. 72-0454 (Sept. 15, 1971) (unreported EEOC finding of reasonable cause where light-skinned "White-looking" Black was selected over dark-skinned, Negroid-featured Black).

145. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

146. In addition to prohibiting discrimination on the basis of religious observances, practices, and beliefs, Title VII requires employers to accommodate work requirements to religious practices. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

147. See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

148. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

149. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

150. 431 U.S. 324 (1977).

easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See, e.g., 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does. . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States").

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Either theory may, of course, be applied to a particular set of facts.¹⁵¹

It is difficult to prosecute a disparate impact claim of racial discrimination in places of high employment. In order to state a claim of such employment discrimination under Title VII, one must rely upon sufficient statistical evidence.¹⁵² Ordinarily, there are too few Black applicants who have applied for a specific position with a particular employer within a given time frame to create an applicant pool large enough to be statistically significant.¹⁵³ The even smaller number of Black employees engenders a greater statistical problem in promotion cases.¹⁵⁴ Hence, as a practical matter, a Black person denied a position or promotion within high employment will probably have to seek legal redress under a disparate treatment theory of employment discrimination.

Proceeding under a disparate treatment theory of employment discrimination, however, will be almost as difficult as suing under a disparate impact theory. This has less to do with the fact that Title VII

151. *Id.* at 335 n.15.

152. See, e.g., *Connecticut v. Teal*, 457 U.S. 440 (1982); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

153. While the Supreme Court has not stated how large a sample must be in order to be statistically significant, it is clear that a Title VII plaintiff must prove that an employer's selection criteria for hiring or promotion creates a "significant" racial disparity. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

154. Adequate numbers are more often available in lower level jobs. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987)(state troopers); *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987)(sex discrimination involving road dispatcher position); *Local 28, the Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(sheet metal workers); *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986)(firefighters); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)(school teachers); *Firefighters v. Stotts*, 467 U.S. 561 (1984)(firefighters). For a detailed discussion of the use of statistics to prove disparate impact, see, e.g., B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 80-161 (2d ed. 1983); Shoben, *Differential Pass-Fail Rates In Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978).

was born at a time when most forms of racism were overt¹⁵⁵ or with the transaction costs attentive upon complex litigation generally¹⁵⁶ than with federal case law. Federal courts have made it extremely difficult for Title VII plaintiffs to win individual disparate treatment cases. Proving racial motivation, establishing causation in mixed-motive cases, and judicial hostility toward even applying Title VII to high-level jobs are among the most serious obstacles to successfully litigating individual disparate treatment cases.

The Supreme Court has developed a system of proof for individual, nonclass disparate treatment cases of employment discrimination.¹⁵⁷ Plaintiff is given the initial burden of proving a prima facie case of disparate treatment. The central issue here goes to defendant's motivation: was defendant motivated by a discriminatory animus? Plaintiff can prove the requisite state of mind by using direct, smoking gun evidence,¹⁵⁸ which is rarely available today,¹⁵⁹ or inferentially using circumstantial evidence.¹⁶⁰ If plaintiff succeeds, de-

155. For an excellent discussion of Title VII legislative history see Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

156. E.g., payment of attorneys' fees up front, delay in litigation, and protracted litigation. See, e.g., Levi, *The Business of the Courts: A Summary and a Sense of Perspective*, 70 F.R.D. 212 (1976); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

157. In a disparate treatment class action, plaintiff must establish that defendant regularly and purposefully treated his or her protected class less favorably than the dominant group, or, in other words, that disparate treatment was not an isolated act but a systemic practice. Such disparate treatment is normally proven by statistical evidence, see *Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), but can also be proven by testimony from numerous individuals, see *Teamsters*, 431 U.S. 324, or by the adoption of broad employment practices or policies based on explicit impermissible criteria, see *Dothard v. Rawlinson* 433 U.S. 321 (1977).

158. See, e.g., *Slack v. Havens*, 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

159. See, e.g., *Gates v. Georgia-Pacific Corp.*, 326 F. Supp 397, 399 (D. Ore. 1970), *aff'd* 492 F.2d 292 (9th Cir. 1974).

160. Although statistics can be used under certain circumstances in individual disparate treatment cases, see *Bompey & Saltman, The Role of Statistics in Employment Discrimination Litigation - A University Perspective*, 9 J. C. & U. L., 263, 271 (1982), most of these cases are established without the use of statistics. In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth the primary non-statistical method of establishing a prima facie case based on circumstantial evidence. 411 U.S. 792 (1973). It must be proven:

(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainants qualifications.

Id. at 802.

fendant is given an opportunity to rebut plaintiff's prima facie case. Defendant does so by showing a "legitimate, nondiscriminatory reason" for plaintiff's treatment.¹⁶¹ If defendant meets its burden of proof, plaintiff is then given an opportunity to show that defendant's stated reason is nothing more than a pretext for intentional discrimination.¹⁶²

In *Texas Department of Community Affairs v. Burdine*,¹⁶³ the Supreme Court let stand a devastating problem of proof for Title VII plaintiffs. The Court reaffirmed earlier Supreme Court rulings that defendant's burden of proving a legitimate, nondiscriminatory reason for plaintiff's treatment is only a burden of production, not one of persuasion.¹⁶⁴ In the absence of smoking-gun evidence or an unsophisticated defendant, the Court's holding makes it easy for a defendant to win on the merits of a disparate treatment case. Defendant can rebut the prima facie case on the basis of admissible but untrue evidence as to its true motivation. Plaintiff, not being privy to defendant's thinking, is left with the near impossible task of persuading the trier of fact that defendant's stated motivation was untrue.¹⁶⁵ Given the fact that defendant is in the best possible position to know the true reasons for the action taken against plaintiff, plus the fact that courts normally allow the use of subjective reasons in articulating a "legitimate, nondiscriminatory reason,"¹⁶⁶ placing the burden of persuasion on the plaintiff is not only exceedingly unfair to the plaintiff but a sure way to smother the truth.¹⁶⁷ It is unrealistic to

161. *McDonnell Douglas Corp.*, 411 U.S. at 802.

162. *Id.* at 804-05.

163. 450 U.S. 248 (1981).

164. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. at 254-55. *See also* *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978) (employer's burden to dispel the adverse inference created by plaintiff's prima facie case is merely to "articulate" some legitimate, nondiscriminatory reason for the action, and not to prove the absence of discriminatory motive); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (employer's burden in rebutting prima facie case is to show that he based his decision on a legitimate consideration, and not on an illegitimate one such as race). Thus, the ultimate burden of persuasion as to the issue of discrimination always remains with the plaintiff. *See generally* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980).

165. *See, e.g., Green v. McDonnell Douglas Corp.*, 528 F.2d 1102 (8th Cir. 1976) (plaintiff fails to prove pretext).

166. *See, e.g., Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 66 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981) (subjective reasons for tenure denial); *Powell v. Syracuse Univ.*, 580 F.2d 150, 156 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) (reasons given for inadequate teaching ability were arguably subjective).

167. Referring to the use of fairness as a principle on which to allocate the burden of proof, Professor Cleary has stated, "The nature of a particular element may indicate that evidence relating to it lies more within the control of one party, which suggest the fairness of allocating that element to him." Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959). Thus, placing the burden of persua-

expect many Black applicants or employees to be able to prove discriminatory intent under these circumstances.

Even if discriminatory intent can be proven, plaintiff will also have to face the problem of proving causation. Because a clever employer will have little trouble meeting its *Burdine* burden, the causation question will probably arise in the murky context of mixed-motive cases.¹⁶⁸

A mixed-motive case is one in which both permissible and impermissible factors play a role in the employer's conduct.¹⁶⁹ A typical example of a mixed-motive case is where a Black candidate is denied a job or promotion both because he or she is less qualified than a White candidate and the employer is racist. Title VII prohibits discrimination "because of" race or color, but does mixed-motive discrimination constitute discrimination "because of" the candidate's race or color?

Unfortunately, the law provides no clear answer. Title VII does not define the causal connector "because of." The Supreme Court has not explicitly decided the causation issue. Lower federal courts have decided it but have gone in different directions.

Although Title VII does not define the causal connector "because of," Title VII does suggest two approaches to mixed-motive cases. The first is presented in Section 703(a)(2), quoted above,¹⁷⁰ which prohibits acts that "tend to deprive" individuals of employment opportunities. Section 703(a)(2) seems to suggest that an impermissible factor (such as, racial prejudice) cannot be among the factors motivating an employer's actions. This approach to mixed-motive cases is called the "taint standard." If an employer's action is tainted by an impermissible factor (specifically, "race, color, sex, religion, or national origin"¹⁷¹), then it is unlawful employment discrimination under Title VII. The taint standard, also called the "discernible factor" standard (the personnel decision is unlawful if race, for example, was a discernible factor in the decision¹⁷²), would seem to be

sion on the plaintiff regarding defendant's "legitimate, nondiscriminatory reason" is hardly compelling from a fairness perspective.

168. For a detailed discussion of the mixed-motive cases, see Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

169. Thus, the mixed-motive issue in individual disparate treatment cases will normally arise at the pretext stage.

170. See *supra* text accompanying note 142.

171. This language is taken from section 703(a), 42 U.S.C. § 2000e-2(a).

172. See, e.g., *Bibbs v. Block*, 36 Fair Empl. Prac. Cas. (BNA) 713 (8th Cir. 1984).

consistent with the broad congressional design of Title VII — namely, “to eliminate . . . discrimination in employment based on race, color, [sex,] religion, or national origin.”¹⁷³

Another section of Title VII, however, suggests a different approach to causation in mixed-motive cases. Section 706(g),¹⁷⁴ patterned after the National Labor Relations Act’s¹⁷⁵ remedial provisions,¹⁷⁶ sets forth the type of relief a prevailing plaintiff may receive under Title VII. The last sentence reads:

No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).¹⁷⁷

Although this sentence would seem to address only the question of remedy, as does all of Section 706(g), the entire section resulted from the adoption of an amendment to Title VII. The amendment’s purpose was to specify to a federal district court that a Title VII violation could be found only when race, color, sex, religion, or national origin was the sole motivation behind the employer’s action.¹⁷⁸ This is sometimes called the “sole factor” standard: causation is established in a Title VII case only when the employment decision is based *solely* on one of the impermissible criteria. Under the “sole factor” standard plaintiff can never prevail in a mixed-motive case, because, by definition, an impermissible criterion was not the sole factor behind the employer’s action.

Federal courts have not been any more decisive than Congress in resolving the causation problem in mixed-motive cases.¹⁷⁹ In *McDonnell Douglas Corp. v. Green*,¹⁸⁰ the Supreme Court seemed to adopt

173. H.R. REP. NO. 914, 88th Cong., 1st Sess. 26 (1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2401. *See also* *United Steelworkers of America v. Weber*, 443 U.S. 193, 202 (1979).

174. 42 U.S.C. § 2000e-5(g) (1982 & Supp. I 1983).

175. 29 U.S.C. §§ 151-169 (1982).

176. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419 n.11 (1975).

177. 42 U.S.C. §§ 2000e-5(g) (1982 & Supp. I 1983).

178. Congressman Emmanuel Celler, who introduced the amendment, stated: Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other — and I emphasize “other” — than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment.

110 CONG. REC. 2567 (1964).

179. For a discussion of causation in systemic disparate treatment cases, *see, e.g.*, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395 (1977).

180. 411 U.S. 792 (1973).

the taint standard suggested in section 703(a)(2). The Court stated that, "In the implementation of. . .[personnel] decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."¹⁸¹ In *McDonald v. Santa Fe Trail Transportation Co.*,¹⁸² the Supreme Court suggested that the proper causation standard may be somewhere between the liberal taint standard and the stricter sole factor standard. Responding to plaintiff's claim that the employer's "legitimate, nondiscriminatory reason" offered for their discharge was mere pretext, the Court said:

The use of the term 'pretext' in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies . . . [N]o more is required to be shown than that race was a 'but for' cause.¹⁸³

McDonald, thus, adopts a "but-for" causation standard. Title VII is violated when plaintiff shows that but for the use of an impermissible criterion (race, color, sex, and so on), the adverse personnel decision would not have been made. The but-for standard is sometimes called either the "dominant taint," "dominant factor," or "determining factor" standard¹⁸⁴ (the personnel decision is unlawful if race, for example, was the dominant or determining factor in the decision), or the "same decision" standard¹⁸⁵ ("which would uphold personnel action based in part on race if merit principles alone would have led to the same result").¹⁸⁶

Like the Supreme Court and Congress, the lower federal courts have not agreed on a causation standard. They seem to be split between the taint and but-for standards.¹⁸⁷ One scholar, however, has concluded that the lower federal courts are moving toward stricter standards of causation.¹⁸⁸

In short, assuming the employer is able to meet its burden of production under *Burdine*, the success of the plaintiff's disparate treatment case may depend on which causation standard the court applies. A plaintiff will have an easier time establishing a Title VII

181. *Id.* at 801.

182. 427 U.S. 273 (1976).

183. *Id.* at 282 n.10.

184. *See, e.g., Bibbs v. Block*, 36 Fair Empl. Prac. Cas. (BNA) 713 (8th Cir. 1984).

185. *Id.*

186. Brodin, *supra* note 168, at 296.

187. *See id.* at 308-10 (cases collected). *See also Bibbs*, 36 Fair Empl. Prac. Cas. (BNA) 713.

188. *See Brodin, supra* note 168.

violation in jurisdictions employing the taint standard than in jurisdictions employing the stricter but-for or sole factor standards.

None of this, however, matters much in some federal courts. Some federal judges have relaxed Title VII's protections in high-level jobs, and others have taken a "hands-off" attitude.¹⁸⁹ As the Second Circuit has observed, these courts have rendered high-level employers "virtually immune to charges of employment bias, at least when the bias is not expressed overtly."¹⁹⁰

These judge-made obstacles to successful litigation of individual disparate treatment cases — burden of proof, standard of causation in mixed-motive cases, and poor judicial attitude — may be in place in spite of, rather than because of, the Black civil rights interest at stake. There may even be "compelling" countervailing interests underpinning these laws and policies. But it cannot be gainsaid that these laws and policies give low or no priority to the Black middle class' civil rights interest — namely, equal employment opportunity. The fact that academic institutions won all but one of the twenty-three race discrimination cases brought in federal court against them between 1971 and 1984,¹⁹¹ is indicative of the deference Title VII gives to middle-class Blacks.

By subordinating the civil rights interest of the Black middle class in employment, Title VII contributes to the problem of complex racial discrimination. Allocation of the burden of proof, the but-for or sole factor causation standards, and judicial defiance in applying Title VII at high levels of employment provide little protection against complex racial discrimination and may even encourage would-be discriminators. Having only the burden of producing evidence probative of a legitimate, nondiscriminatory reason for disparate treatment, and having the protection of the but-for or sole factor test in mixed-motive cases, an employer has great opportunities to discriminate and get away with lying about it.¹⁹² Judicial disdain for Title VII provides both an opportunity and a motivation to discriminate, without having to lie about it.

Title VII's racially subordinating features also contribute to the problem of conspicuous racial stratification in high-level jobs. The burden of proof and the causation standards are so onerous for plaintiffs, and the judicial attitude so obvious that not only is the probability of winning a Title VII lawsuit remote, but also many

189. See, e.g., Brooks, *Civil Rights Scholarship: A Proposed Agenda for the Twenty-First Century*, 20 U.S.F. L. REV. 397, 410 (1986); Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 959-78 (1982).

190. Bartholet, *supra* note 189, at 961 (quoting *Powell v. Syracuse Univ.* 580 F.2d 1150, 1153 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978)).

191. Shipp, *The Litigiousness of Academe*, N.Y. Times, Nov. 8, 1987, § 12, at 63.

192. Of course, the motivation to discriminate is racism or some perceived economic benefit to the employer.

Blacks are discouraged from even filing a Title VII complaint in federal court. If Blacks do not win Title VII cases or file Title VII lawsuits, Title VII is less effective in doing what Congress intended it to do — create employment opportunities for Blacks in occupations that have been traditionally closed to them. As the Supreme Court has stated:

[I]t was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' . . . and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.¹⁹³

It is worth noting briefly that Title VII also subordinates working-class Blacks and may, to some extent, subordinate underclass Blacks.¹⁹⁴ But because of different socioeconomic conditions, racial subordination in these instances differ in substance from what the Black middle class experiences.¹⁹⁵ For poorer Blacks, Title VII suffers from many of the same defects as Title VIII, the Fair Housing Act, which is discussed later in Part IV. Both antidiscrimination laws provide only theoretical protection for these segments of Black society, because poorer Blacks lack either the time, flexibility, or resources to pursue complex litigation. True attorneys fees can be awarded to a successful Title VII litigant.¹⁹⁶ Most lawyers, however, require three to five thousand dollars up front to cover filing fees, the

193. *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 448-49 (1986). The Court is quoting from *United Steelworkers of America v. Weber*, 443 U.S. 193, 203 (1979) (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)). The Court also stated that "Title VII was designed 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [W]hite employees over other employees.'" 478 U.S. at 448 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). See also *Teamsters v. United States*, 431 U.S. 324, 364-65 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

194. Title VII can subordinate underclass Blacks who are in a position to call upon its use. For these underclass Blacks, the substance of racial subordination under Title VII parallels that of working-class Blacks. Such racial subordination can make employment discrimination as dominant a class problem for these underclass Blacks as social dysfunction and cultural self-destruction is for all underclass Blacks. The inability to acquire or to recapture a job lost through employment discrimination (past or present) can prevent a poor Black from climbing out of the underclass as much as it can propel a wealthier Black into the underclass.

195. Blacks interested in low-level jobs, however, are ordinarily in a position to take advantage of disparate impact discrimination, whereas Blacks interested in better-status jobs usually are not. Because there are more Black workers and applicants at low-level jobs than at high level positions, statistical analysis is more likely to be available in low-skill than in high-skill jobs.

196. § 706(k), 42 U.S.C. § 2000e-5(k) (1982).

cost of discovery, and other start-up expenses.

Knowing that access to Title VII is remote for poorer Blacks, especially if they are unemployed, or that Title VII litigation is an uphill endeavor even for richer Blacks, some employers find little deterrence in Title VII. Frequently, they will refuse the government's efforts to reconcile the dispute, and gamble that neither the government nor the Black complainant will pursue the matter to federal court. Employment discrimination and segregation are reinforced each time this strategy pays off.¹⁹⁷

Other civil rights laws and policies weigh heavier on working-class and underclass Blacks than Title VII. These features of formal equal opportunity are given extensive treatment in subsequent parts of this article.

3. *Summary*

By far the smallest segment of Black society, the Black middle class is also the most assimilated segment of Black Americans. A typical Black middle class household consists of a nuclear family in which both parents work, at least one as a business manager or professional. The household, in addition, possesses a late model automobile, a complete line of household appliances, and investments or savings. Annual household income ranges between \$45,000 and \$85,000. Like their White counterparts, the average Black middle class household is stable and comfortable.

Unlike the White middle class, however, race burdens and in some instances threatens the material success of the Black middle class. Long after the death of Jim Crow, color still remains a significant factor in a skilled and talented Black person's chances for sustained happiness and worldly success. This is particularly so in high-level employment. Loneliness, disaffection, stress and hypertension (or John Henryism), complex racial discrimination, and conspicuous racial stratification in high-level employment are the dominant class problems facing the Black middle class. Complex racial discrimination and racially segregated top jobs are the most serious class problems; they fuel the other class problems and have deleterious social consequences. Racial wage gaps, the collective experiences of middle-class Blacks, and the existence of racial stratification in high-paying jobs give evidence of complex racial discrimination in places of high employment. Likewise, complex racial discrimination and hard statistical evidence establish the existence of Black underrepresentation in high-status jobs.

197. For a detailed discussion of Title VII's administrative process, see M. ZIMMER, C. SULLIVAN & R. RICHARDS, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 363-460 (1982).

Complex racial discrimination and racially segregated jobs are linked to formal equal opportunity by racial subordination. Civil rights laws and policies or practices fully sanctioned by the federal government and designed to vindicate the racial omission tenet — the strict scrutiny test in racial preference law and the burden of proof, standard of causation, and poor judicial attitude in antidiscrimination law — give low or no priority to the Black middle class' civil rights interest in equal employment opportunity. These judge-made features of formal equal opportunity subordinate this important civil rights interest by, in the case of the strict scrutiny test, intercepting, enjoining, or discouraging public sector employers from using the only proven means of engendering racial inclusion, and, in the case of the other features, by decreasing the odds of winning individual disparate treatment cases under Title VII. As a consequence of these incidents of racial subordination, there are fewer good opportunities in law to redress complex racial discrimination and segregation in employment. Racial subordination depletes the arsenal of weapons that can be used to combat complex racial discrimination and segregation; it vitiates the Black middle class' defenses against racial exclusion. In a word, the strict scrutiny test's rejection of racial inclusion and Title VII's inability to unearth complex racial discrimination on an individual basis, show little comity for the equal-employment-opportunity interest of middle-class Blacks and, as a consequence, leave these Black Americans more, not less, vulnerable to employment discrimination, underrepresentation, and other employment hardships such as tokenism, loneliness, disaffection, and John Henryism.

Racial subordination in this area of the law may contribute to the socioeconomic problems of the Black middle class in a more active way. It may actually *encourage* employment discrimination or segregation. For, when the courts give low respect to the Black middle class employment interests, that not only provides a would-be discriminator with the opportunity to discriminate and get away with lying about it, but it also sends encouraging signals to those individuals. Some employers may read the courts' construction of Title VII, particularly the courts' reluctance to apply Title VII to top jobs, as a green light to engage in subtle forms of employment discrimination; it is permissible to discriminate, so long as you do so discretely or cleverly.

Title VII also subordinates the employment interests of the Black working class and underclass. Poorer Blacks, especially if unem-

ployed, lack either the time, resources, or flexibility to pursue costly and protracted litigation. These Black Americans, however, have other problems of a more immediate nature peculiar to their class status. The next part of this article addresses these problems.

PART IV BLACK WORKING CLASS

A. Defining Characteristics

The Bureau of Labor Statistics offers two benchmark income levels that help to establish the upper income level for the Black working class. One level — called “low budget” — is set at approximately \$18,000 for the middle to late 1980s. The other level — called “medium budget” — is set at approximately \$31,250 for the same period.¹⁹⁸ As with all Bureau of Labor Statistics income levels published since at least 1981, these levels are based on the cost of maintaining a family of four in an urban setting and adjusted annually for inflation.

A low-budget family normally rents rather than owns its home. It most likely lives without air-conditioning and cannot afford to hire a handyman to do home maintenance and repairs. Relative to higher-budget families, this family “eats less meat and more potatoes, drinks less wine and liquor but more beer.” The low-budget category “is not designed as a subsistence budget; the family in this category should be able to function with “a sense of self-respect and social participation.”¹⁹⁹

In contrast, a medium-budget family enjoys a higher standard of living. Ordinarily, it owns its home and has about fifteen years remaining on its mortgage. According to a study by the United Auto Workers, this budget category provides one new suit every three to four years for the father, three street dresses every two years for the mother, a new television set every ten years, a new refrigerator every seventeen years, a new toaster every thirty-three years, a used car every four years, nine movies for adults and none for children each year, and no savings.²⁰⁰

Notwithstanding these differences, low- and medium-budget families are remarkably alike in essential ways. They share many cultural characteristics — such as, occupational status and family structure — and are less stable than “high-budget” families (\$46,800 in annual income), the Bureau of Labor Statistics’ next income level.²⁰¹ Consequently, it is not unreasonable to combine low-

198. S. Rose, *supra* note 59, at 8.

199. *Id.*

200. *Id.*

201. *Id.*

and medium-budget families into one class — the Black working class — and to allow the high-budget floor to indicate the class' income ceiling. For purposes of discussion (and with the understanding that setting the line of demarcation between socioeconomic classes is not an inexact science), I shall take \$45,000 (the income floor I use for the Black middle class) as the upper income limit for the Black working class. Accordingly, the family income range for this segment of Black society is \$18,000 to \$45,000.

Using this income range, approximately 55 percent of Black Americans belong to the working class, compared to approximately 63 percent of White Americans. With approximately 37 percent of Black Americans belonging to the underclass, compared to approximately 16 percent of White Americans, the Black working class is the largest segment of Black society.²⁰²

The following is a more detailed profile of Black working class households.

- 32 percent of Black working class households consists of family units headed by both husband and wife. As to the husbands: 6 percent are either unemployed, "farmers" (meaning farm laborers or farm owners), or "professionals" (meaning such salaried workers as teachers, engineers, technicians, police officers, firemen, small-business owners, and sales representatives); 50 percent are semi-skilled or unskilled blue-collar or service workers; and an equal percentage (13 percent) are either employed in a "clerical" position (meaning postal workers, secretaries, sales clerks, telephone operators, and so on) or retired. As to the wives: an equal percentage (25 percent) are either keeping house or employed as semi-skilled or unskilled blue-collar or service workers; 19 percent are clerical workers; 13 percent are professionals; and an equal percentage (6 percent) are either employed as "managers and owners" (meaning salaried managers of businesses or such self-employed professionals as doctors and lawyers) or retired.²⁰³
- 2 percent of Black working class households are male-headed families, in which the household head is most likely a professional.²⁰⁴

202. See *supra* text accompanying notes 65-66.

203. See S. Rose, *supra* note 59, at 12-13, 21-22.

204. *Id.* at 21-22.

- 16 percent of Black working class households are female-headed families, of which an equal percentage of the household heads (13 percent) are either not in the labor force, unemployed, professionals, or retired; and an equal percentage of the household heads (25 percent) are either semi-skilled or unskilled blue-collar or service workers or retired.²⁰⁵
- 10 percent of Black working class households consist of single men, of which an equal percentage (20 percent) are not in the labor force or are clerical workers or managers; and 40 percent are semi-skilled or unskilled blue-collar or service workers.²⁰⁶
- 8 percent of Black working class households consist of single women, of which an equal percentage (25 percent) are likely to be semi-skilled workers, professionals, or retired.²⁰⁷

Some working-class Blacks live in constant fear of slipping into the underclass. Many who have crossed the poverty line are still very close to the world of hunger and hovels. Others who have never experienced poverty live but a misstep away from its open doors — a divorce, the untimely death of a spouse, the unemployment of a working spouse, a catastrophic illness in the family, old age, or retirement. Indeed, between 1978 and 1986, 5.2 percent of the nation's working class fell below the poverty line or into the low end of the working class. And during this same period, a dramatic seven million Americans were added to the ranks of the poor.²⁰⁸

Several factors seem to explain such instability within the American working class, Black or White. Irrational economic behavior²⁰⁹ and expediency or a lack of long-term planning²¹⁰ seem to be among the most destabilizing forces within this segment of American society.²¹¹

205. *Id.*

206. *Id.*

207. *Id.*

208. *TIME*, Jan. 5, 1987, at 49.

209. Irrational economic habits basically entail living beyond one's financial means and misallocating household funds. These class traits are often manifested in several ways: piling up consumer debt; forgoing savings and investments in order to purchase state-of-the-art consumer goods; and purchasing late model cars that not only require higher monthly payments, but also higher insurance, property taxes, and maintenance costs. One of the most irrational habits is the tendency to have too many children. These lovely objects of one's affection are expensive to raise, especially on a meager income.

210. Living life for the moment—from pay check to pay check or weekend to weekend—and without direction or without the constraints of a life-plan can often result in a financially depleting life-style. Although some of this behavior may be impulsive, much of it is probably the consequence of a lack of knowledge or exposure to rational living in a complex society.

211. Crime, drug abuse, and alcoholism can also threaten to destabilize some working-class Blacks. Any family can become distracted, emotionally enervated, and even torn apart by a teenager's criminal acts, a mother's drug addiction, or a father's

Even though the Black working class is no more or no less susceptible to these menacing effects than their White counterparts, the Black working class, unlike the White working class, must contend with certain racial factors that can be more destabilizing and demoralizing to Blacks than any of the racially-neutral factors. These racial barriers to a better life constitute the Black working class' special class problems.

B. The Subordination Question

1. Dominant Class Problems

Working-class Blacks are particularly vulnerable in two of the most consequential areas of American life: housing and education. Housing discrimination and segregation, often accompanied by violence, are the main problems in the housing area. Two sets of socioeconomic problems are dominant in education: the lack of "quality education" in primary schools; and the low enrollment of Black students in undergraduate and graduate schools.

The Black underclass also faces serious housing and educational problems — problems similar to those encountered by the Black working class. These problems, however, are not as destabilizing as the internal problems underclass Blacks face. Dysfunctional and self-destructive behaviors, values, and attitudes within the Black underclass necessarily preclude personal or group advancement to the working class.²¹² In contrast, the housing and educational problems discussed here do not necessarily block entry into the Black working class; they present major barriers for advancing to the Black middle class. It is only after one has been extricated from self-annihilation can one begin to deal with the enemy from without. Housing and educational problems, in short, are the major problems with which Blacks who have *reached* working-class status must deal. They are problems of the Black working class that, more than most other problems, hinder advancement to a more stable life in the Black middle class.

alcoholism.

212. See *infra* Part V.B.1. for a discussion of the problems facing the Black underclass.

a. Housing

After enduring months of racial taunts and acts of vandalism, a Black family moved out of its home in a working-class neighborhood on Cleveland's West Side.²¹³ A year later, an interracial couple and their two children were subjected to numerous threats, racial slurs, and acts of vandalism by angry White neighbors demanding that they and another Black family leave a working-class Italian enclave in Southwest Philadelphia.²¹⁴ Earlier that same year, a Black woman living by herself in a Chicago apartment complex, and the only Black living in that complex, walked out of her apartment to find her car resting on slashed tires. The act was repeated later on, and this time her headlights were also smashed. On other occasions, she returned home to find her telephone line snipped, her apartment ransacked, and an unsigned letter containing racial slurs and the following threat: "Last Chance, Get Out." The letter was the final blow; she moved out of her apartment.²¹⁵

These stories underscore an ugly truth about life in America today: some two decades after Congress passed the Fair Housing Act,²¹⁶ housing discrimination and segregation, sometimes buttressed by acts of violence, "remains the pattern in neighborhoods from New York to California." This pattern is especially prevalent in working-class neighborhoods, which consist of low- and moderate-priced housing.²¹⁷

Housing discrimination today is more subtle than these stories might otherwise suggest. In fact, housing discrimination, like most racial discrimination in the post-1960s,²¹⁸ mainly takes the form of

213. L.A. Times, June 12, 1986, pt. I, at 20, col. 4 (San Diego ed.).

214. N.Y. Times, Dec. 1, 1985, § 1, at 38, col. 1.

215. Wall St. J., Oct. 28, 1985, at 1, col. 1.

216. Fair Housing Act of 1968 (Title VIII), Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-19 (1982)).

217. TIME, June 30, 1986, at 40. See also N.Y. Times, Dec. 1, 1985, § 4 (Wk. in Rev.), at 3, col. 1, at 8, col. 1; N.Y. Times, Nov. 24, 1985, § 4 (Wk. in Rev.), at 8, col. 1; Wall St. J., Oct. 28, 1985, at 1, col. 1.

218. It is unusual to find overt acts of racism today. Although well-publicized, Howard Beach, Queens — where in December of 1986 three Black teenagers who walked into a diner to use a telephone were chased and beaten by a gang of White youths, resulting in the death of one of the Black teenagers who was forced into an oncoming car by the mob — and Cummings County, Georgia — where in January of 1987 the Ku Klux Klan stoned a group of Blacks who were marching to commemorate Dr. Martin Luther King's birthday — involved rare incidents of overt racism. See TIME, Jan. 5, 1987, at 48; N.Y. Times, Dec. 28, 1986, § 4 (Wk. in Rev.), at 10, col. 1. See also Leavy, *What's Behind the Resurgence of Racism in America?*, EBONY, Apr., 1987, at 132; Freedman, *Racial Tension in New York is on Increase Despite Gains*, N.Y. Times, Mar. 29, 1987, § 1 (Main), at 1, col. 4; Simpson, *Black College Students are Viewed as Victims of a Subtle Racism*, Wall St. J., Apr. 3, 1987, at 1, col. 1; TIME, Apr. 6, 1987, at 57; Davidson, *Private Schools for Black Pupils are Flourishing*, Wall St. J., Apr. 15, 1987, at 33, col. 3. See generally H. ASHMORE, *HEARTS AND MINDS: THE ANATOMY OF RACISM FROM ROOSEVELT TO REAGAN* 138 (1982).

complex racial discrimination — racial discrimination that is subtle in the sense that it is sophisticated, unconscious, or institutionalized and frequently accompanied by nonracial factors. In contrast to the “Al Campanis syndrome,”²¹⁹ practitioners of complex racial discrimination are usually clever enough to hide their anti-Black feelings.²²⁰ “Smiling discrimination” is a prime example of complex racial discrimination.

Housing officials have noted that Blacks “often encounter discrimination with a smile.” As one housing official has stated: “Many times people are denied [housing] and know they’ve been denied, but don’t know it’s discrimination The person may be very nice and may never directly say anything that leads [prospective tenants or homeowners] to know it’s something about them . . . but is told that a unit is not available.”²²¹

According to the Kentucky Human Rights Commission, another common example of smiling discrimination in the housing area works as follows. A rental agent will tell a Black family, “I’m very sorry, but we don’t have a vacancy today.” Later, the same agent will tell a White family the same thing, but add, “I expect we’ll have one tomorrow.”²²² Numerous examples of smiling discrimination in other areas of interracial relations appear daily in the news media.²²³

Smiling discrimination is not the only form of complex racial discrimination in housing today. To quote one observer: “The ploys are endless.” In Atlanta, for example, “one ruse is to demand earnest

219. Al Campanis, a former major league baseball player, was fired from his position as the Los Angeles Dodgers, Vice-President for player personnel, the third-highest position in the organization, for the bush-league bigotry he displayed in a TV interview on ABC’s *Nightline* April 6, 1987. Asked by anchor Ted Koppel why there are no Black managers, coaches, or owners in baseball, Campanis said Blacks may lack “some of the necessities” to hold managerial positions. After a “flabbergasted” Koppel gave him a chance to remove his foot from his mouth, Campanis stuck it in deeper by remarking—from out of left field—that Blacks are “not good swimmers because they don’t have the buoyancy.” TV GUIDE, Apr. 18-24, 1987, at A-2, (San Diego ed.). See L.A. Times, Apr. 9, 1987, pt. III, at 1, col. 1 (San Diego ed.).

220. For an exploration of these feelings, see, e.g., Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 L. & INEQUALITY J. 101-04, 107 (1987).

221. TIME, June 30, 1986, at 40.

222. *Id.*

223. For example, there is the suburban shopping mall sales girl who waits on a White customer before waiting on a Black customer who was there first. There is also the night club owner who imposes a certain dress code designed to keep Blacks out or who plays a certain type of music (e.g. country and western) when “too many” Blacks are on the dance floor. See, e.g., TIME, Mar. 10, 1986, at 46; San Diego Reader, July 26, 1984, at 1, col. 1; East County Today, Nov. 30, 1983, at 2B, col. 1; San Diego Union, Dec. 31, 1983, at B3, col. 6.

money in cash from a [B]lack prospect. When the would-be buyer returns from the bank, he is told, 'Sorry, the property has been taken.'” Another maneuver is for rental and sales agents to tip off one another “by writing the names of [W]hite applicants in script.”²²⁴ “Steering” — where real estate agents deliberately direct Black prospects to Black or mixed neighborhoods and Whites to neighborhoods with few Blacks — is yet another example of complex racial discrimination in housing. According to University of Chicago urbanologist Gary Orfield, steering is “[o]ne of the driving engines of resegregation If you can stop that, you’ve solved a big part of the problem.”²²⁵

b. Education

1) Primary Education

Contrary to popular belief, the desire for quality education is very strong among Black Americans. As Professor Derrick Bell of Harvard Law School has concluded from his research: “American [B]lacks have sought effective public schooling for their children for two centuries.”²²⁶ Of all the problems Black Americans have encountered and still face in their quest for quality education, or effective public schooling, the one internal problem that most Blacks today seem to have resolved is the problem of defining “quality education,” or “effective public schooling.”

Perhaps it can be said that most Black Americans desire an educational program that combines three ingredients: the “three Rs,” Black pride, and cultural diversity. Like all children, Black children need good basic schooling. They need to learn how to read, write, and do arithmetic. But because of the lingering effects of prior racial subordination, Black children also need special instruction in Black pride. Such instruction mainly entails the creation of educational programs that can help Black children to become aware of and to deal with low self-esteem, racial sensibility, and other negative aspects of being Black in a racist society. Furthermore, Black children, like all American children, should be educated within a culturally diverse setting. This will not only enable American children to learn how to function more effectively in a culturally diverse society, but will also help America’s culturally diverse society function more effectively. The importance of cultural diversity in education was recognized almost a century ago by a Kansas court:

At the common schools, where both sexes and all kinds of children mingle

224. TIME, June 30, 1986, at 40.

225. *Id.*

226. D. BELL, RACE, RACISM, AND AMERICAN LAW 364-68 (2d. ed. 1982).

together, we have the great world in miniature; there they may learn human nature in all its phases, with all its emotions, passions and feelings, loves and hates, its hopes and fears, its impulses and sensibilities; there they may learn the secret springs of human actions, and the attractions and repulsions, which lend with irresistible force to particular lines of conduct. But on the other hand, persons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of their society which surrounds them; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools.²²⁷

Notwithstanding Black America's quest for quality education, more than a generation after *Brown v. Board of Education*,²²⁸ scores of underclass and working-class Black children receive no semblance of quality education in their schools. These children attend public schools that provide inferior basic schooling, few or no programs for Black awareness, or little cultural diversity. Frequently, all of these poor qualities combine in one school.

A 1985 report prepared for the Joint Center on Political Studies by Professor Jennifer Hochschild of Princeton University indicates the extent to which cultural diversity is lacking in American public schools. Professor Hochschild states that one-third of all Black children were attending "one-race" schools — schools ninety percent or more Black — in 1980. Although this is less than the two-thirds percentage of Black children attending one-race schools in 1968, the "pace of desegregation has slowed dramatically" since 1980. In fact, there has been "little desegregation since 1976," and, not surprisingly, racial isolation is accelerating as we move toward the end of the 1980s.²²⁹

Meaningful desegregation has even eluded the Topeka, Kansas public school system, the named defendant in *Brown v. Board of Education*. In 1985, the son of the lawyer who represented Linda Brown Smith, the named plaintiff in the case who in 1954 was a pupil in the Topeka school system, petitioned the district court on behalf of Ms. Smith's daughter to re-open *Brown*. The petition was based on the ground that, some thirty years after the Supreme Court's 1954 desegregation decree, the school board still had not de-

227. *Ottawa v. Tinnon*, 26 Kan. 1, 19 (1881).

228. 347 U.S. 483 (1954).

229. Wall St. J., Oct. 22, 1985, at 22, col. 1. The study was published by the Joint Center for Political Studies in 1985 under the title, THIRTY YEARS AFTER BROWN. Founded in 1970, the Joint Center is a nonprofit research institute located in Washington, D.C. It publishes a monthly magazine entitled Focus, which is cited throughout this article.

segregated its public schools.²³⁰

2) Higher Education

If college and post-graduate education are the keys to Black worldly success,²³¹ then the future for Black Americans grows bleaker each year. After an enrollment explosion during a brief period in the 1970s, Black enrollment in four-year colleges began to fall during the 1980s. Various studies underscore this point.

One study, conducted by the American Association of State Colleges and Universities, shows that while the number of Black high-school graduates grew substantially between 1975 and 1982, the percentage of these students enrolling in college declined from 31.5 percent to 28 percent during this period. In contrast, the percentage of White high-school graduates going to college held steady and even slightly increased from 32.4 percent to 32.5 percent during the same period. The study also reveals that the decline in Black enrollment at some schools far exceeds the national average. For example, Black enrollment at Oberlin college in Ohio fell thirty-nine percent in the twelve-year period ending in 1985.²³²

Another study indicates that by 1985 Black enrollment in colleges decreased further and began to stagnate at about twenty-four percent of Black high school graduates while White enrollment climbed to almost forty-three percent of White high school graduates. Even if Black enrollment has reached its nadir, the picture remains rather bleak. The fact remains that Blacks "have a smaller presence on American campuses than they did six years ago, both in absolute terms and as a percentage of all undergraduates."²³³

What accounts for the low enrollment of Blacks in colleges and universities? Cutbacks in federal financial aid during the 1980s is certainly partially responsible.²³⁴ But there is another less obvious agent to which little attention has been given: racial subordination.

230. Wall St. J., Sept. 3, 1985, at 1, col. 1.

231. See RAND RPT., *supra* note 37, at 21-41.

232. Wall St. J., May 29, 1985, at 1 col. 1; TIME, Nov. 11, 1985, at 84.

233. Fiske, *Enrollment of Minorities in Colleges Stagnating*, N.Y. Times, Apr. 19, 1987, § 1 (Main), at 1, col. 1. See Washington Post, Apr. 13, 1987, at 29, col. 1. Figures from the Census Bureau also show a decline in Black college enrollment between 1980 and 1985. They also indicate that Black women have enrolled in college in much larger numbers than Black men during this period. BLACK ENTERPRISE, April, 1987, at 39.

234. For a discussion, see Fiske, *supra* note 239, at 18, cols. 2-3. See also *infra* text accompanying notes 320-23.

2. *Racial Subordination*

Through its tenet of racial omission,²³⁵ formal equal opportunity subordinates working-class Blacks. Such racial subordination, in turn, contributes to the dominant, or special, class problems encountered by this segment of Black society. Specifically, it directly causes, accommodates, or even encourages complex racial discrimination and *de jure* or *de facto* segregation in housing as well as a lack of quality education in public schools and low Black enrollment in higher education.

a. *Housing*

"My right to live where I choose was violated."²³⁶ This is the cry of a young Black woman who was victimized by housing discrimination and by acts of violence to her home. And it is the civil rights interest at stake for the Black working class in housing. Working-class Blacks have a strong civil rights interest in equal housing opportunity. They demand the right to seek housing wherever it is available; the right to live wherever one chooses. As will be seen in the discussion of racial occupancy controls later on, it may be necessary to temporarily frustrate the open housing interest of a few working-class Blacks in order to vindicate the long-term open housing interest of many more working-class Blacks.

Several features of the legal apparatus designed to implement the racial omission tenet give low priority to the fair housing interest of working-class Blacks and, hence, contribute to housing discrimination and segregation within this segment of Black society. The intent test, the strict scrutiny test, the paper-tiger statutory scheme of the Fair Housing Act of 1968, low damage awards, and protracted litigation are the major subordinating features of civil rights law since the 1960s. By giving low priority to the Black working class' housing interest, each of these acts of governance contributes to housing discrimination and segregation.

1) *Intent Test*

The intent test comes into play when a federal constitutional challenge is made — usually under the equal protection clause of the

235. See *supra* text accompanying notes 33-34 for an explanation of the concept of racial omission.

236. Celis, *Closed Doors: Justice, HUD Oppose Housing Segregation, But Enforcement Lags*, Wall St. J., Oct 28, 1985, at 1, col. 1.

Fourteenth Amendment²³⁷ — against a state, city, or municipal land use law, policy, or practice having an exclusionary effect on working-class Blacks. Limited only by human imagination, land use devices that preclude Blacks from obtaining affordable housing in desirable areas come in a variety of configurations: a new state constitutional provision requiring prior voter approval in the form of a local referendum before any municipality can develop a federally funded low-rent housing project; a suburban township's charter provision requiring prior voter approval of all zoning changes within the township by a fifty-five percent referendum vote; a city's decision to rezone property a private group targeted for a low-and-moderate-income housing project; or a city's denial of a religious order's request to rezone a segment of its own land from single-family to multiple-family housing, the effect of which is to prevent the owner from constructing low-and-moderate-income housing on its land.

The United States Supreme Court and the lower federal courts have given constitutional clearance to these and other land use manipulations in spite of their obvious exclusionary effect on the lower Black classes. According to the federal courts, these tactics are perfectly permissible under the Constitution's equal protection clause because they are "facially-neutral" as to race — they do not contain an explicit racial classification, such as the type so prevalent in the days of Jim Crow; no "Whites Only" or "niggers stay out" language on the face of these laws. They are not, therefore, racially discriminatory.²³⁸

The fact that these laws do have a visible effect on most Black Americans may, the Supreme Court concedes, indicate the existence of racial discrimination. But the Court has placed a burden on Black plaintiffs more difficult to scale than the property barriers themselves. A plaintiff must prove that the legislative body enacting the land use barrier intended to exclude Blacks. No matter how outrageous the exclusion, the intent test remains the standard of liability for a civil rights claim brought under the Constitution.

237. The equal protection clause protects individuals against legislative action or private action conducted "under the color of state law." The fifth amendment, which protects individuals against federal action, has an equal protection component in its due process clause that is co-extensive with that of the fourteenth amendment. U.S. CONST. amends. V, XIV. *See, e.g.,* United States v. Paradise, 480 U.S. 149, 166 n.16 (1987).

238. *See, e.g.,* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); City of Eastland v. Forest City Enter., Inc., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971). Land use barriers may, of course, discriminate on the basis of economic status. But such discrimination apparently does not merit constitutional protection. *See* Dandridge v. Williams, 397 U.S. 471, 485-86 (1970). *Accord* Jefferson v. Hackney, 406 U.S. 535, 547 (1972). *See also* Boddie v. Connecticut, 401 U.S. 371 (1971) where the claims of indigents who were unable to pay divorce filing fees were treated as due process rather than as equal protection claims.

*Washington v. Davis*²³⁹ is the seminal case on the intent standard of liability. This 1976 Supreme Court case came to the Court from Washington, D.C. Black applicants, whose rate of failure on a written police examination was significantly higher than that for White applicants, filed a lawsuit claiming that the exam was racially discriminatory in violation of the Fourteenth Amendment's equal protection clause. Disagreeing with lower federal courts, which at that time had held that disproportionate effects standing alone will suffice to prove racial discrimination, the Supreme Court said that ". . . to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."²⁴⁰ The intent standard has been upheld in subsequent Supreme Court decisions.²⁴¹

Effects are not, however, entirely irrelevant to an equal protection claim. They can be used as a basis for proving discriminatory purpose. They are among a panoply of factors probative of a discriminatory state of mind. As the Court stated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,²⁴² proof of a discriminatory intent requires "a sensitive inquiry into circumstantial and direct evidence of intent."²⁴³ In a more recent case, *Rogers v. Lodge*,²⁴⁴ which dealt with voting rights under the equal protection clause, the Supreme Court was even more direct: "[discriminatory motive] may often be inferred from the totality of the relevant facts, including the fact, if true, that the law bears more heavily on one race than another."²⁴⁵

Although systemic disparate effects constitute a relevant area of inquiry — if only as a means of probing discriminatory intent — the Supreme Court has not really lightened a plaintiff's arduous burden of reading a defendant's state of mind. Considering the fact that the defendant in land use and other equal protection cases is normally

239. 426 U.S. 229 (1979).

240. *Id.* at 244-45.

241. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

242. 429 U.S. 252 (1977).

243. *Id.* at 266.

244. 458 U.S. 613 (1982).

245. *Id.* at 618. "Relevant facts" include the magnitude of the disparity, foreseeability of the consequences of the government's actions, legislative history, patterns of conduct and the government's knowledge of the disparate impact. *Dowdell v. City of Apopka*, 698 F.2d 1181, 1186 (11th Cir. 1983). See also *Zimmer v. McKeithan*, 485 F.2d 1297, 1305-07 (5th Cir. 1973), *aff'd per curiam on other grounds sub nom.* *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

an institution of government, the plaintiff's burden can at times be nearly impossible to satisfy. The Supreme Court itself in *Personnel Administrator v. Feeney*²⁴⁶ has indicated, albeit inadvertently, just how difficult the plaintiff's burden can be.

In *Feeney*, the Massachusetts legislature passed a law granting military veterans absolute preference for state jobs. Because ninety-eight percent of the veterans were males, the veteran's preference law had the foreseeable and natural effect of excluding females from state jobs. The law was challenged on equal protection grounds. Reversing the lower court, which found the law's adverse impact on women too inevitable to have been "unintended," the Supreme Court ruled that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."²⁴⁷ How can a plaintiff realistically meet this incredible burden of proof? How useful are such "relevant facts" as foreseeability and magnitude of disparate impact in probing discriminatory intent? When can it objectively be said that these inferences of intentional discrimination have ripened into proof?

Some of these concerns have even been raised by justices of the Supreme Court. No justice has been a more thoughtful critic of the Court's approach to the equal protection clause than Justice Stevens. Not only does he criticize the intent test on the ground that it lacks a "judicially manageable standard for adjudicating cases of this kind," he also observes that:

[I]n the long run constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause. . . . The costs and the doubts associated with litigating questions of motive, which are often significant in routine trials, will be especially so in cases involving the 'motives' of legislative bodies.²⁴⁸

With his usual perspicuity, Justice Stevens points out the utter nonsense of the intent test: "[I]t is incongruous that subjective intent is identified as the constitutional standard and yet the persons who allegedly harbored an improper intent are never identified or mentioned."²⁴⁹

The intent test, in short, places the task of winning an equal protection case against a legislative body somewhere between extremely difficult and impossible. By holding on to the intent test — which is

246. 442 U.S. 256 (1979).

247. *Id.* at 279.

248. *Rogers v. Lodge*, 458 U.S. 613, 643, 645 (1982).

249. *Id.* at 647.

nowhere mentioned in the equal protection clause — the Supreme Court is giving low priority to the equal housing opportunity interest of working-class Blacks. The justices are telling these Black Americans that “in spite of” the latter’s legitimate interest in breaking through land use barriers that limit the places in which they can seek affordable housing — and “in spite of” the absolute illogic of the intent test — the Supreme Court shall not abandon or modify the current standard of liability under the equal protection clause.²⁵⁰

True, all who claim under the equal protection clause are subject to the limitations of its standard of liability. But this is too simplistic. The promise and agony of equal protection litigation are not evenly distributed between Black and White Americans. The Fourteenth Amendment was “passed in large part to protect” Black Americans.²⁵¹ Since *Brown v. Board of Education*, fourteenth amendment equal protection has been a critical tool in the struggle for racial equality in this country. The equal protection clause has special meaning and consequence to a vulnerable people.

Some of that consequence is apparent in the housing area. By subordinating the open housing interest of working-class Blacks, the intent test necessarily contributes to their special housing problems. The intent test accommodates, and may even encourage, complex racial discrimination and segregation in housing. For the standard of liability is so difficult to meet that a good portion of housing discrimination and segregation simply cannot be redressed. Municipalities bent on maintaining a racially exclusionary way of life are virtually assured of prevailing in a private lawsuit, so long as they are smart enough to keep their true motives hidden. Quite naturally, this discourages victims of housing discrimination and segregation from even attempting to bring a lawsuit under the equal protection clause. The high probability of an unsuccessful lawsuit also provides little incentive for municipalities to change exclusionary land use laws, policies, or practices. What is worse, the intent test is so predictably onerous that would-be discriminators or segregationists may read it as a signal from the federal government that in the final analysis housing discrimination and segregation are quite permissible so long as true motives are kept private and everything is done with a smile.

250. For further discussion of the intent test in a legislative context, see, e.g., Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

251. M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION xxxiv (1982).

2) *Strict Scrutiny Test*

One of the most effective ways — some might say the only effective way — to counteract complex housing discrimination — particularly smiling discrimination and steering — and segregation is through the remedial use of racial preferences. Voluntary rather than court-imposed or other involuntary use of racial preferences²⁵² play a crucial role in resolving issues of racial discrimination and segregation.²⁵³ In housing, racial occupancy controls, or “benign quotas,” are the most common form of voluntary racial preferences.²⁵⁴

Racial occupancy controls are housing policies or practices that manage desegregation through the use of racial quotas. Mainly used in public housing,²⁵⁵ racial occupancy controls seek to create stable, desegregated communities by regulating residency on the basis of race. Thus, depending on the racial composition of a particular neighborhood or housing development, a housing authority may give preference to a Black or White family so that the percentage of both racial groups will remain roughly constant.

The necessity for such racial management is predicated on social science data showing that as predominantly White communities become poor and predominantly Black, White abandonment gradually occurs. The loss of White residents resulting in the transition of a community to a predominantly Black population is commonly referred to as “tipping.” Architect and city planner Oscar Newman has testified that the “tipping point is a quantity that is difficult to predict with precision. It has been variously estimated, in different factual contexts, as ranging from a low of 1% [B]lack to a high of 60% [B]lack. Most social scientists and housing experts agree that under normal circumstances tipping begins to occur at between 10% and 20% [B]lack occupancy.”²⁵⁶ Economist Anthony Downs states the case for racial occupancy controls by observing that “almost all racially integrated neighborhoods and housing developments that have remained integrated for very long have used deliberate manage-

252. For a discussion of the distinction between voluntary and involuntary racial preferences, see, e.g., Brooks, *Affirmative Action In Law Teaching*, COLUM. HUM. RTS. L. REV. 15, 25-27 (1982).

253. See, e.g., *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 630 n.8 (1987)(cases cited); *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979).

254. See, e.g., D. BELL, *supra* note 226, at 535-41.

255. See, e.g., Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 251-53 (1974); Wall St. J., Aug. 28, 1986, at 50, col. 1.

256. *United States v. Starrett City Assocs., Starrett City, Inc., and Delmar Management Co.*, 660 F. Supp. 668 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

ment to achieve certain numerical targets as to the proportion of minority-group occupants."²⁵⁷

Although some lower federal courts have upheld the use of racial occupancy controls,²⁵⁸ others have not.²⁵⁹ In addition, the Reagan Justice Department has won an important case against racial occupancy controls.²⁶⁰ The reason is clear: racial occupancy controls — a most intense and blatant form of race-conscious social engineering — strike at the very heart of the racial omission tenet. In so doing, they violate the strict scrutiny test.²⁶¹

Racial occupancy controls cannot survive faithful application of the strict scrutiny test's two-tier analysis. Heavily predicated upon a racial (and, hence, suspect) classification, racial occupancy controls invoke strict judicial review. Given no evidence (such as an admission) of prior racial discrimination perpetrated by the housing authority or municipality imposing the controls, a governmental purpose compelling enough to justify use of the controls seems lacking. Other governmental interests — such as the prevention of resegregated communities and the nurturing of positive interracial relations — should be but are not compelling enough to trigger a favorable ruling under the strict scrutiny test.

The strict scrutiny test's treatment of racial occupancy controls highlights its fundamental defect — the inability to distinguish between race-conscious policies that engender *racial exclusion* and those that promote *racial inclusion*. Applied to the former, such as Jim Crow laws, the strict scrutiny test is commendable; it promotes racial progress. But applied to the latter, such as racial occupancy controls and other forms of affirmative action, the test is reprehensi-

257. A. DOWNS, *OPENING UP THE SUBURBS* 99 (1973). For a discussion of more social science data see D. BELL, *supra* note 226, at 531-32, 535-37.

258. See, e.g., *Schmidt v. Boston Hous. Auth.*, 505 F. Supp. 988 (D.C. Mass. 1981); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973).

259. See, e.g., *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 493 F. Supp. 1225 (S.D.N.Y. 1980). See generally Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs That Discourage Black Entry To Prevent White Flight*, 981 DUKE L.J. 891 (1981).

260. *Starrett City Assocs.*, 660 F. Supp. 668. *Starrett City Assocs.* was decided on statutory grounds, namely the Fair Housing Act. *Id.* at 677. The district court distinguished *Otero* on the ground that it was decided on a constitutional standard. *Id.* at 677-78. This distinction is somewhat odd, because the Constitution is generally more restrictive in the use of racial classifications than the Congress. See, e.g., *Johnson*, 480 U.S. 616, at 627-28 n.6. *Starrett City Assocs.* is the major case in the Reagan Administration's long assault on racial occupancy quotas. See, e.g., Wall St. J., Aug. 26, 1986, at 50, col. 1.

261. See *supra* text accompanying notes 124-35 for a full discussion of the strict scrutiny test.

ble; it enjoins racial progress.²⁶²

This paradox is inevitable. The fundamental purpose of the strict scrutiny test is to effectuate the tenet of racial omission, to prohibit governmental use of race as a factor in the formulation of laws and public policies. Dogged adherence to this racial perspective is bound to have a chilling effect on those who continue to suffer from the government's conscious use of race in the past. Sometimes, the conscious use of race in the reverse direction is needed. Sometimes fire must be fought with fire.

True, some working-class Blacks may be denied housing due to the racial quota. But it is clear beyond peradventure that this form of racial discrimination is vastly different from traditional racial discrimination against Blacks for several reasons. First, racial occupancy controls seek to engender racial inclusion; traditional racial discrimination attempts to stigmatize and exclude Blacks. Second, racial occupancy controls are more limited in scope and duration than traditional racial discrimination. Third, most working-class Blacks denied housing probably would be willing to move on to desegregate or integrate another community or would consider their temporary denial of housing a small price to pay for racial progress. These Blacks, on the other hand, probably would not tolerate the old George Wallace brand of racial discrimination.

The strict scrutiny test, in short, not only fails to take race into account, but — except under a most compelling circumstance (namely, as a remedy for prior racial discrimination by the housing authority or municipality) — it commands the *omission* of race in the government's formulation of laws and public policies regulating access to housing. Given the difficulty of proving prior racial discrimination under the intent test, it is clear that unless there is an admission of prior racial discrimination, the compelling circumstance that allows the government to use racial occupancy controls may never materialize. This application of the strict scrutiny test gives little respect to the equal housing opportunity interest of working-class Blacks, because it realistically denies them the use of a proven means of counteracting wide-spread, institutionalized racial discrimination and segregation in housing.

Such racial subordination can only contribute to the housing discrimination and segregation problems (socioeconomic vulnerability) within the Black working class. It can only prolong the struggle against complex racial discrimination and *de jure* or *de facto* segregation. Lest one forget the pernicious effects of housing segregation regardless of cause, I hasten to add that as housing segregation con-

262. I believe that the major challenge confronting those who oppose legitimate forms of racial preference is to devise an alternative means of fostering racial progress.

tinues to expand, it etches an indelible suggestion in the nation's mind that yesteryear's racial hierarchy has returned or has never left.²⁶³

3) *Fair Housing Act*

The Fair Housing Act of 1968, also known as Title VIII of the 1968 Civil Rights Act,²⁶⁴ provides an alternative to a constitutional challenge against housing discrimination and segregation. Unlike equal protection law, the Fair Housing Act is free of constraints imposed by the intent test and the strict scrutiny test. It is also uncurbed by the Constitution's governmental-action requirement,²⁶⁵ which means that the Act applies to private parties — home owners, realtors, lending agencies, and others.²⁶⁶ In spite of these benefits, the Act is virtually a deadletter in the fight against housing discrimination and *de facto* segregation. The Act's effectiveness was strangled in its infancy by a myopic Congress. And other branches of government have inhibited all attempts to revive the patient.

No other conclusion seems fair or accurate: the Fair Housing Act is poorly structured and administered. The Act prohibits discrimination on grounds of race, color, religion, or national origin in the sale or rental of housing.²⁶⁷ Redlining is expressly proscribed.²⁶⁸ These prohibitions are designed to promote "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."²⁶⁹ This policy, however, is a toned-down restatement of the 1949 Housing Act's policy that "every American family" should be provided "a decent home and suitable living environment . . . as soon as feasible."²⁷⁰

The watered-down policy statement presages other anemic features of the Act. For example, the Act's antidiscrimination provision is vitiated by several statutory exemptions. One is the single-family-housing exemption, which exempts a single family house sold or

263. Negative images of Blacks can ignite latent racism in some Whites and can also be depressing for Blacks, especially the young.

264. Fair Housing Act of 1968 (Title VIII) Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. 3601-19 (1982)).

265. For a discussion of the governmental-action requirement, *see supra* note 237.

266. 42 U.S.C. §§ 3604-06.

267. *Id.* § 3604.

268. *Id.* § 3605.

269. *Id.* § 3601.

270. Spencer, *Enforcement of Federal Fair Housing Law*, 9 URB. LAW. 514 (1977).

rented by a person who owns three or fewer single family houses.²⁷¹ Another is the so-called "Mrs. Murphy's Boarding House Exemption." This provision exempts any owner-occupied building "containing . . . no more than four families living independently of each other. . . ."²⁷²

Such government-sanctioned housing discrimination is not benign. These statutory exemptions promote racial exclusion rather than racial inclusion, perpetuate rather than liberate Black Americans from a history of racial oppression. More than that, they *encourage* housing discrimination and segregation, especially in the heavily segregated single-family housing market. For this reason, these exemptions are arguably unconstitutional under the Supreme Court's holding in *Reitman v. Mulkey*.²⁷³ In this case, the Court held that California's famous Proposition 14, which amended the state's constitution to give all persons the "absolute discretion" to sell or rent their property as they saw fit, violated the United States Constitution because it had the effect of nullifying fundamental state policies against racial discrimination and, hence, of "encouraging" private housing discrimination.²⁷⁴

The Fair Housing Act's sanctions are also defective. To be sure, they are so impotent as to be an embarrassment to anyone genuinely concerned about housing discrimination and segregation. Actual damages are often meager — such as, \$500, \$1500, or \$3500²⁷⁵ — and punitive damages — which are designed to be a deterrent to prospective wrongdoers — are limited to \$1,000.²⁷⁶ Clearly, these paper-tiger sanctions neither compensate victims nor discourage wrongdoers.

Governmental administration of the Fair Housing Act is also flawed. Although the Department of Housing and Urban Development (HUD) is largely responsible for the Act's administration, it lacks a crucial administrative tool: enforcement powers. Only the Justice Department or injured private citizens can initiate a civil complaint.²⁷⁷ Frequently, prosecutors are overburdened. During the Reagan Administration, they have also become ideologically resistant to prosecution.²⁷⁸ Typically, an injured party is in a poor position to initiate litigation. He or she will usually lack the time or resources to commence a lawsuit.

271. 42 U.S.C. § 3603(b)(1).

272. *Id.* § 3603(b)(2).

273. 387 U.S. 369 (1967).

274. *Id.*

275. See *infra* note 287 and accompanying text.

276. 42 U.S.C. § 3612(c). The next section of this article discusses damages in greater detail.

277. *Id.* §§ 3610, 3612.

278. See, e.g., *TIME*, June 30, 1986, at 40; *Wall St. J.*, Oct. 28, 1985, at 1, col. 1.

Poorly structured and administrated, the Fair Housing Act subordinates the Black working class. The Act's exemptions, sanctions, and enforcement provisions place this segment of Black society in racial jeopardy. It allows them to endure any form of housing discrimination — old or new — a discriminator can envision. And it nurtures the expanding concentration of Blacks in densely populated, geographically isolated areas.

Worst, the Fair Housing Act encourages would-be housing discriminators and segregationists. Even apart from its exemptions, the Act, rather than being a deterrent, all but gives a license to those with a bent toward housing discrimination or segregation. It tells them in words and by deeds that the federal government is not terribly interested in combatting housing discrimination or segregation. There can be little wonder why complex racial discrimination and *de facto* segregation continue to plague the Black working class.²⁷⁹

4) Damages and Protracted Litigation

Monetary relief awarded in housing litigation plus the time and effort required to successfully prosecute a lawsuit also frustrate the equal housing opportunity interest of working-class Blacks. Such subordination is not limited to constitutional and Title VIII litigation. It arises as well in the context of what is called "Section 1982" litigation.

Section 1982 is derivative of the Civil Rights Act of 1866.²⁸⁰ Its name is taken from its present codification in the United States Code.²⁸¹ Section 1982 is a short provision. It reads in full: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by [W]hite citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."²⁸²

The provision saw little action until 1968. In that year, it experienced a kind of judicial resurrection in the landmark case of *Jones v. Alfred H. Mayer*.²⁸³ The Supreme Court held in this case that

279. It has been estimated that 75.9 percent of the Black population "lives inside urbanized areas, of which 75.4 [percent] live in central cities, in contrast to only 42.1 [percent] of [W]hites." *Starrett City Assocs.*, 660 F. Supp. at 673.

280. See Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 261-62 (1977) (sources cited therein).

281. 42 U.S.C. § 1982.

282. *Id.*

283. 392 U.S. 409 (1968). See also Note, *Civil Rights—Racial Discrimination and Property Rights—The Scope of 42 U.S.C. § 1982*, 28 WAYNE L. REV. 203 (1982).

Section 1982 “bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the thirteenth amendment.”²⁸⁴ Significantly, the link to the Thirteenth Amendment is based on the Court’s realization that “. . . when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”²⁸⁵

Section 1982’s usefulness in fighting housing discrimination and the herding of men and women into ghettos is severely limited by the amount of monetary relief traditionally awarded in housing litigation. Punitive damages are frequently limited to the \$1000 ceiling prescribed in the Fair Housing Act.²⁸⁶ And rather than the five- to seven-figure awards plaintiffs routinely receive in some tort cases — such as, emotional distress — prevailing plaintiffs in housing cases frequently receive meager compensatory damages — perhaps as low as \$500, \$1500, and \$3500.²⁸⁷ As the California Attorney General has stated, these awards “barely cover the costs of difficult, time-consuming civil rights litigation.”²⁸⁸ Professor Derrick Bell offers the following explanation for this extraordinary situation:

[T]here is seldom a major out-of-pocket loss in a housing discrimination case. Usually the real injury suffered by the plaintiffs is the deep humiliation of racial rejection that is no less painful because it is deemed to be an intangible harm. Some courts have recognized this form of injury as a compensable type of damage through awards for emotional distress or embarrassment It is possible that the generally low level of these damages is in part due to the fact finder’s lack of personal experience with this type of injury. It may also be due to an effort to find middle ground between the progressive legislation which is in some ways in advance of social realities, and the residual racism which makes it difficult to enforce such legislation fully.²⁸⁹

All civil rights litigation is protracted. It takes years to go from

284. 392 U.S. at 412-13 (emphasis in original).

285. 392 U.S. at 441-42. Although Justice White believes that intent test applies to Section 1982 actions, *City of Memphis v. Greene*, 451 U.S. 101, 129 (1981), the Court itself has not so ruled. The Court has, however, ruled that section 1982’s sister provision, Section 1981, 42 U.S.C. § 1981 requires proof of intent to discriminate. *General Building Contractors Ass’n v. Pennsylvania*, 458 U.S. 375 (1982). See Comment, *Dead-end Street: Discrimination, the Thirteenth Amendment, and Section 1982*, *City of Memphis v. Greene*, 58 CHI.-[]KENT L. REV. 873 (1982).

286. See, e.g., *Marable v. Walker*, 704 F.2d 1219 (11th Cir. 1983) (trial court limited damages to \$1,000). But see *Philips v. Hunter Trails Community Assoc.* 685 F.2d 184, 191 (7th Cir. 1982) (\$100,000 punitive damages awarded under Section 1982).

287. See J. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* 478 (1983); D. BELL, *supra* note 226, at 516-520. See also *Philips*, 685 F.2d at 190.

288. Office of the Attorney General-John K. Van de Kamp, News Release, at 1 (July 10, 1986).

289. D. BELL, *supra* note 226, at 516-18.

the filing of a complaint to the rendering of a judgment by a court.²⁹⁰ Working-class Blacks simply lack the time, resources, and flexibility to commit themselves to such an ordeal. Even if damages could cover the cost of litigation, it would still be difficult for many working-class Blacks to take extensive or even any time out from work and family to participate fully in complex litigation. The wait itself may be enough to discourage the most ardent civil rights plaintiff.

Meager damages and protracted litigation place the Black working class in a poor position to defend itself from housing discrimination and segregation. Regardless of how complex or simple the discrimination, litigation would not be cost efficient. Even if cost efficient, litigation may be an impossible alternative in light of its time-consuming nature. Knowing this, prospective discriminators or segregationists may not be deterred. Possibly, they may also feel the law, being so accommodating, provides them tacit permission to discriminate against Blacks. Housing discrimination and *de facto* segregation can only flourish under these circumstances.

b. Education

1) Primary Education

Like a child with a thousand parents, ineffective public schooling — the absence of the “three Rs,” Black pride, and cultural diversity²⁹¹ — has many precipitators. Paltry teacher salaries, low professional esteem, and housing segregation — which concentrates Blacks into poor, racially isolated school districts — are among the primary causes of ineffective public schooling.²⁹² Formal equal opportunity is also a major contributing factor. Racial subordination created by implementation of the racial omission tenet reinforces poor public schooling. More specifically, the intent test — which seeks to effectuate the racial omission tenet in the area of primary education — is a major obstacle in the Black working class’ quest for quality education.

Federal courts have remedial power to issue desegregation orders.

290. Civil rights litigation in which the trial court retains subject matter jurisdiction—such as school desegregation—seems never-ending. *See, e.g.,* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

291. *See supra* text accompanying notes 226-29.

292. *See, e.g.,* Wall St. J., Oct. 22, 1985, at 22, col. 1. According to Professor Gary Orfield of the University of Chicago, housing segregation and resegregation are the primary reasons for segregated and resegregated public schools. *Id.*

Invoking this great power is not, however, easy. Plaintiffs must first prove that the defendant school board or state government intentionally established or maintained a dual school system — one White, the other Black. Proof of segregative intent is required because, as in the case of exclusionary land use laws,²⁹³ the equal protection clause is the relevant source of judicial authority. But, once again, the intent standard of liability is nowhere to be found in the fourteenth amendment or its legislative history. It is simply judge-made.²⁹⁴

Once segregative intent is established, a court has broad “inherent equitable” discretion to approve a wide variety of desegregative measures tailored to the constitutional violation. Racial balancing is one such measure. Mandatory or voluntary busing, magnet schools, pupil or faculty quotas, and school district rezoning are typical examples of racial balancing. In the parlance of civil rights lawyers, this cluster of racial balancing measures is often referred to as “*Swann* remedies” because the Supreme Court approved their use in the famous case of *Swann v. Charlotte-Mecklenburg Board of Education*.²⁹⁵ Judicial authority to order *Swann* remedies was confirmed in a companion case, *Davis v. Board of School Commissioners*,²⁹⁶ in which the Supreme Court ruled: “Having once found a violation, the district court or school authorities should make every effort to achieve the greatest possible degree of actual desegregation . . . [and consider the use of] all available techniques.”²⁹⁷ Significantly, the Court also stated that “[t]he measure of any desegregation plan is its effectiveness.”²⁹⁸

Racial balancing fosters two ingredients necessary for quality education. The first is cultural diversity. There simply is no other sure way to provide cultural diversity within racially isolated school districts than to use some form of racial balancing. The second is the three Rs. Although it would be terribly wrong to think that predominately Black schools necessarily provide poor schooling in the three Rs, it cannot be gainsaid that at least some of these schools lack sufficient educational resources to accommodate good, basic schooling. To the extent that a suburban or other predominantly White school district provides better basic schooling than a predominantly Black one, racial mixing between the two gives Black children better exposure to the three Rs.

293. See *supra* text accompanying notes 237-38.

294. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Austin Indep. School v. United States*, 429 U.S. 990 (1976) (remanded for reconsideration in light of *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

295. 402 U.S. 1 (1971).

296. 402 U.S. 33 (1971).

297. *Id.* at 37.

298. *Id.* (emphasis added).

The phenomenon of "White flight" has defeated many attempts to achieve racial balancing within single school districts. A serious problem in school desegregation, this phenomenon adversely affects one side of the equation for successful racial mixing: White pupils. It depletes the number of White pupils available for racial mixing within a particular school district. White flight is effectuated when White parents either send their children to private, religious, or other nonpublic schools or, as in most cases, move to the suburbs where exclusionary zoning ordinances erect economic and racial barriers for low-and-moderate-income Blacks.²⁹⁹

Current school desegregation law has created its own barriers for Blacks attempting to deal with the problem of White flight. In what is now known as *Milliken I*,³⁰⁰ the Supreme Court ruled that the intent test applies to every independent school district included in a desegregation plan. Segregative intent, therefore, must be established as to every autonomous suburban school district before such a school district can be forced to participate in a school desegregation plan.³⁰¹

Although the most widely attempted desegregative measure, racial balancing is not the only response to school segregation. In some cases (such as those involving White flight), racial balancing may not even be a feasible remedy. Provided that segregative intent is established, a school desegregation plan can contain educational enrichment elements. These elements emphasize good basic schooling more directly and intentionally than racial balancing. Some elements also involve instructional programs in Black pride, Black history, Black culture, and other subjects dealing with the special educational needs of Black children. None of these remedial programs, however, attempts to tackle the problem of racial isolation; for, none can create cultural diversity.³⁰²

*Milliken II*³⁰³ is the seminal case on educational enrichment programs. In that case, the Supreme Court held that a district court may order state officials to share in the future cost of educational enrichment programs. The Court reasoned that these programs respond to a constitutional violation and are designed to restore injured

299. See *supra* text accompanying notes 256-57.

300. *Milliken v. Bradley*, 418 U.S. 717 (1974).

301. *Id.* at 743-44.

302. See, e.g., *Kelly v. Metropolitan Co. Bd. of Educ.*, 687 F.2d 814 (6th Cir. 1982), cert. denied, 459 U.S. 1183 (1983); *Clark v. Board of Educ.*, 705 F.2d 265 (8th Cir. 1983).

303. *Milliken v. Bradley*, 433 U.S. 267 (1977).

parties to a position they would have occupied had there been no constitutional violation.³⁰⁴

Educational enrichment components can stand on independent legal grounds. Lower federal courts have approved educational enrichment programs even though the desegregation plans in which they appear contain no racial balancing measure. Some lower federal courts have even approved such programs over the objection of school authorities.³⁰⁵ Desegregation plans composed only of educational enrichment components may be the only feasible form of school "desegregation" for one-race school districts.³⁰⁶

Educational enrichment programs and racial balancing may be wonderful remedies, but they are hard to come by. The intent test is no less an obstacle to Blacks in school cases than in housing cases.³⁰⁷ Proving a legislative body's state of mind is extremely difficult; clever school officials can easily hide their true motivations from public scrutiny. Discriminatory motivations may even be more easy to conceal in the North than in the South because the former's history of *de jure* segregation is not as extensive as the latter's.

The intent test, in short, is no friend of the Black working class. By making the task of proving segregative intent in school cases very difficult, the intent test subordinates the Black working class's interest in equal educational opportunity. And by giving low priority to the equal educational opportunity interest of working-class Blacks, the intent test impedes efforts to achieve quality education. If the Supreme Court provided the Black working class with more effective equipment to deal with an educational problem that is in large part the legacy of prior racial subordination, much of that problem would come to an end — an end that is long overdue.³⁰⁸

304. *Id.* at 281.

305. *See, e.g.*, cases cited *supra* note 302.

306. The prototype desegregation plan for all-Black schools is what has come to be known as the "Atlanta Compromise." Implemented in 1973 in Atlanta, Georgia, the Compromise gave Blacks the right to obtain control of the predominantly Black Atlanta school district and to select a Black educator as superintendent. Blacks were also given financial backing to implement an ambitious educational enrichment program that gave special emphasis to mathematics and reading by a most unusual feature: the school board was given power to set its own tax rate without having to resort to a public referendum to raise money. The assessed valuation on Atlanta's commercial and residential property nearly doubled from \$2.7 billion in 1973 to \$5 billion in 1986. The only major problem with the Compromise, from my point of view, is the lack of cultural diversity. Atlanta's demographics — there are simply not enough Whites in the school district to make racial balancing meaningful — and the Supreme Court's restrictions on interdistrict remedies, *Milliken I*, 418 U.S. 717 (1974), make cultural diversity in Atlanta public schools not even a remote possibility. For more on the Atlanta Compromise, *see, e.g.*, Clendinen, *Urban Education that Really Works*, N.Y. Times, Apr. 13, 1986, § 12 (Educ. Life, Special sec.), at 68-70. *See also* D. BELL, *supra* note 226, at 415-17.

307. *See supra* text accompanying notes 237-51.

308. In spite of the undeniable importance of cultural diversity as an element of quality education, my inclination is to see cultural diversity as an ideal. On the other

2) Higher Education

Like the problem of quality education, the problem of low Black enrollment in undergraduate and graduate schools is caused by several factors. One important factor is the upsurge of racism on college campuses during the 1980s.³⁰⁹ Such racism, as Joseph Duffey, chancellor of the University of Massachusetts at Amherst, has recognized, creates "a perception that [B]lacks and other minorities are no longer welcome on college campuses."³¹⁰ Most unsettling, campus racism may adversely affect the academic progress on Blacks already enrolled in college. Not only can color affect the character or candor of advice from White professors and academic advisors, but "[s]ubtle racism may be creating a sort of self-fulfilling prophecy, denying to many [B]lack and other minority-group students, no matter how bright and well-prepared they are, full participation in higher education at its best."³¹¹ Such slights and insensitivities as being the last person picked as a lab partner,³¹² the recipient of requests to feel your hair or the extra muscles the coaches claim you have in your legs,³¹³ or within hearing distance of the White student who proclaims in the dormitory that "he didn't want niggers living on the floor,"³¹⁴ cut deeper than wounded pride and hurt feelings. Many educators believe that "the way minority students are per-

hand, I view good, basic schooling and Black pride, the other components of quality education, as educational necessities. For these reasons, I find the Atlanta Compromise, *see supra* note 306, acceptable, although less than the ideal educational program. I support the 250 independent Black schools that are now flourishing as alternatives to public education. *See Daniels, Private Schools For Black Pupils Are Flourishing*, Wall St. J., Apr. 15, 1987, at 33, col. 3.

309. *See, e.g., Staples, The Dwindling Black Presence on Campus*, N.Y. TIMES MAG., Apr. 27, 1986, at 52; Watkins, *Minorities' Enrollment In College Retreats After Its Surge in '70s*, Wall St. J., May 29, 1985, at 1, col. 1; TIME, Nov. 11, 1985, at 84; Simpson, *Black College Students Are Viewed as Victims of a Subtle Racism*, Wall St. J., Apr. 3, 1987, at 1; TIME, Apr. 6, 1987, at 57. There has also been an increase in racial tension throughout America, *see, e.g., Leavy, What's Behind The Resurgence of Racism in America*, EBONY, Apr. 1987, at 132; Freedman, *Racial Tension in New York Is On Increase Despite Gains*, N.Y. Times, Mar. 29, 1987, § 1 (Main), at 1, col. 4; San Diego Union, Dec. 31, 1983, at B-3, col. 6, and in Europe, *see, e.g., TIME*, Feb. 6, 1984 at 40-45.

310. Fiske, *Enrollment of Minorities In Colleges Stagnating*, N.Y. Times, Apr. 19, 1987, § 1 (Main), at 1, col. 2.

311. Simpson, *Black College Students Are Viewed as Victims of a Subtle Racism*, Wall St. J., Apr. 3, 1987, at 1, col. 1.

312. *Id.*

313. Staples, *The Dwindling Black Presence on Campus*, N.Y. TIMES MAG., Apr. 27, 1986, at 52.

314. Watkins, *Minorities' Enrollment In College Retreats After Its Surge in '70s*, Wall St. J., May 29, 1985, at 22, col. 3.

ceived and treated at a school has a direct bearing on their ability to perform well academically. 'Success and the feeling of belonging are intimately connected.'"³¹⁵ The academic consequences of campus racism can only weigh against a Black high school student's decision to go to college.

The dearth of Black faculty on campus may also discourage Black high school students from going to college.³¹⁶ Black faculty not only serve as important role models for Black students but can also help them deal with racism and its pernicious effects — such as racial sensibility.³¹⁷ The absence of this essential resource from campus may be seen as a strong indication of the college's true feelings toward Blacks — that they are unwelcome.³¹⁸

The fact that so many college educated Blacks must still contend with employment discrimination³¹⁹ may also be very discouraging for high school students contemplating college. Vulnerability to employment discrimination dramatically discounts the market value of a Black person's college degree. Along with campus racism and the paucity of Black college professors, the existence of racism in the nation's top jobs and the susceptibility of Black college graduates to such racism may explain why Black high school students have not responded well to expanded recruitment programs instituted by many colleges and universities in response to the college enrollment problem.³²⁰

Cutbacks in federal financial aid is another major factor contributing to the low number of Blacks enrolled in college. According to a report issued by the United Negro College Fund and the National Institute of Independent Colleges and Universities, the shift in federal financial aid from direct grants to loans since 1980 has hit Blacks especially hard. The reasons are clear:

Some 42 percent of UNCF students come from families whose income is at the poverty level or below, and 30 percent are from families earning less than \$6,000 a year . . . [T]hese same students have fewer alternative resources to fall back on. Their families are poorer, they earn less at their summer jobs, they are more likely to live in states that offer relatively small amounts of grant assistance and they receive little institutional

315. Simpson, *supra* note 317, at 1, col. 1.

316. See, e.g., Staples, *supra* note 313, at 46. Kolbert, *Minority Faculty: Bleak Future*, N.Y. Times, Aug. 18, 1985, § 12 (special section on Education), at 42, col. 1; San Diego Union, Feb. 9, 1986, at A-30, col. 1; Johnson, *Ivy League Blacks Find Life in Microcosm on the Campus*, N.Y. Times, May 20, 1979, § 1 (Main), at 47, col. 1.

317. See, e.g., *infra* text accompanying notes 377, 391-97, 425-29.

318. The shortage of Black faculty tends to feed on itself. "If a [B]lack child never encounters a [B]lack professional, that suggests a lot to him about his own potential." San Diego Union, Feb. 9, 1986, at A-30, col. 1. (Interview with H. Dean Propst, Chancellor of the University of Georgia).

319. See *supra* Part III B1.

320. See Watkins, *supra* note 314, at 22, col. 3; N.Y. Times, Dec. 6, 1981, § 1 (Main), at 17, col. 1.

assistance.³²¹

Samuel DuBois Cook, president of Dillard University, a Black university in New Orleans, offers the following insights about the effects of declining federal grants on Black college enrollment:

What we are seeing is the undercutting of hope, the erosion of ambition and expectation. The availability of loans doesn't necessarily solve the problem. In a lot of cases, you're talking about loans that amount to an entire family income. A lot of young people are simply afraid to undertake that kind of obligation, even for the worthy cause of education.³²²

Reductions in federally- and privately-funded recruitment programs for gifted Black high-school students also contribute to the college-enrollment problem. Reductions in these special recruitment programs have been significant. For example, Upward Bound, which is run through federal grants to colleges, served some 33,000 students in 1985 compared to a peak of 51,000 students in 1973. On the whole, Upward Bound and three major private programs "served about 85,000 fewer students [in 1986] than five years [earlier]."³²³

The racial omission tenet is certainly among the most important reasons fewer Blacks are attending college today compared to ten years ago. Enforcement of this tenet by colleges and universities, as well as by federal officials, has had a direct impact on the number of Blacks attending college. Since 1978, colleges and universities have placed less emphasis on race in the admissions process. This shift in emphasis did not come out of the blue; it came as a response to *Bakke*,³²⁴ a Supreme Court decision that at least in part embraces the racial omission tenet.

In *Bakke*, a divided Supreme Court ruled five to four that state educational institutions could not set aside a specific number of slots for which only racial minorities could compete. Of the majority, only Justice Powell rested his decision on the Constitution, the equal protection clause.³²⁵ Justice Stevens and the other three justices who joined in his opinion (Burger, Stewart, and Rehnquist) felt that there was no need to reach the constitutional issue because the quota could be invalidated on statutory grounds. They specifically held that the quota violated Title VI of the 1964 Civil Rights Act,³²⁶ which prohibits federal funds from going to programs that discriminate on

321. Washington Post, Apr. 13, 1987, at 29, col. 1.

322. *Id.* See TIME, Nov. 11, 1985, at 84.

323. See, e.g., Staples, *supra* note 313, at 51-52.

324. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1976).

325. *Id.* at 320.

326. *Id.* at 414.

the basis of race, color, or national origin.³²⁷

Going the other way, the Court ruled five to four that the equal protection clause does allow state educational institutions to use race in “a properly devised admissions program.”³²⁸ For Justice Powell, race could be used as only one factor in the admissions process and only if it was used to achieve a diverse student body.³²⁹ But for Justices Brennan, White, Marshall, and Blackmun, race could be used to counteract the lingering affects of prior racial subordination (including societal discrimination) as well as present-day racial subordination.³³⁰ Unlike Justice Powell, the other four justices would not apply the strict scrutiny test to race-conscious remedies designed to assist minorities. Rather, they would apply an intermediate level of scrutiny — somewhere between the strict scrutiny test and the rational basis test³³¹ — mainly to assure that the remedy in question neither stigmatizes, stereotypes, nor specially burdens any other minorities.³³² Finally, Justice Brennan’s group would also uphold the use of the quota under Title VI, on the ground that,

Title VI prohibits only those uses of racial criteria that would violate the fourteenth amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the fourteenth amendment.³³³

Bakke is a poor case from which to draw conclusions about the affect of the equal protection clause in general and the strict scrutiny test in particular on college admissions. Only Justice Powell invalidated the quota on equal protection grounds. He was also the only justice to use the strict scrutiny test. True, Justice White joined in that part of Justice Powell’s opinion relying on the strict scrutiny test.³³⁴ But Justice White also joined Justice Brennan’s opinion in full,³³⁵ which caused Justice Powell to view Justice White as an advocate of intermediate scrutiny.³³⁶ Significantly, the four justices who would not scrutinize benign quotas strictly — Brennan, Marshall, Blackmun, and (possibly) White — have not won the day in subsequent benign quota cases. Since *Bakke*, a majority of Supreme Court justices, including Justice White, have taken the position that all explicit racial classifications — whether racially exclusive or inclusive — are subject to strict scrutiny; and that only national secur-

327. 42 U.S.C. §§ 2000d to 2000d-4.

328. 438 U.S. at 320.

329. *Id.* at 314-16.

330. *Id.* at 370-78.

331. *See supra* text accompanying notes 125-33.

332. 438 U.S. at 358-62.

333. *Id.* at 327.

334. *Id.* at 387.

335. *Id.*

336. *Id.* at 294-95.

ity or the defendant's past or current intentional discrimination — not societal discrimination — will justify the use of such a classification.³³⁷

To the extent that the strict scrutiny test, on its face or as applied, effectively prohibits the use of explicit, racially inclusive classifications in college admissions — and assuming that more effective admissions alternatives are not available — it could be argued that the strict scrutiny test subordinates the Black working class in higher education.³³⁸ But it can also be argued that *Bakke* itself, even viewed without reference to the strict scrutiny test, gives low priority to the interest of the Black working class in higher education. *Bakke* set in motion a tone of inflexibility and even racial insensitivity in the admissions process that has had a direct impact on Black college enrollment in the last decade. Post-*Bakke* admissions at the University of California at Davis Medical School, the defendant in *Bakke*, illustrates this point.

In 1978, Davis' medical school, like other state educational institutions throughout the country, restructured its admissions process to comply with *Bakke*. The redrawn affirmative action plan did not, however, yield more or even the same number of new Black students as the pre-*Bakke* plan. In fact, it produced far fewer. Davis' medical school has experienced a "sharp decline in [B]lack enrollment since 1978."³³⁹ Davis hired an affirmative-action specialist, Ms. Margie Beltran-Atencio, to deal with its enrollment problem. Ms. Beltran-Atencio had experience in medical school affirmative action programs at other schools. Her assessment of Davis' post-*Bakke* affirmative action plan is instructive. She asserts that the plan "unfortunately didn't do as much as it could have It lacked a certain human touch, . . . too much reliance was placed on evaluation of a student's application, rather than of 'a human person.'"³⁴⁰

Bakke, in short, subordinates the Black working class in at least two ways. First, it invalidates the use of benign quotas, except under extremely limited circumstances. Whether on constitutional, statutory, or any other ground, invalidating the use of admissions quotas to rectify past societal discrimination or to otherwise promote racial inclusion gives low priority to the equal educational opportunity in-

337. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

338. The argument here parallels the argument concerning racial occupancy controls discussed *supra* text accompanying notes 252-63.

339. N.Y. Times, Dec. 6, 1981, § 1 (Main), at 17, col. 1.

340. *Id.* at 1, col. 6.

terest of the Black working class in higher education. Second, *Bakke*'s rejection of such racial preferences has been read incorrectly by colleges and universities as providing a mandate to assume an inflexible or insensitive attitude toward Black applicants. *Bakke* allows for the subtle use of race in the admissions process, which, of course, is not as effective as a more aggressive race-conscious admission program. But, unfortunately, admissions programs developed in response to *Bakke* do not take full advantage of even this small bone. Too often they focus too much on traditional academic indicators and too little on underlying racial dynamics or on the "whole person."³⁴¹ This approach disproportionately denies admissions to the few promising Blacks who dare to apply to college.

Bakke's racial subordination can only contribute to the college enrollment problem. Without the use of quotas and relying mainly on traditional admissions criteria, fewer promising Blacks will be admitted to college or graduate school. *Bakke* and its resultant admissions processes clearly do not counteract the enrollment problem; they simply allow it to exist. As a wiser Supreme Court has stated on another occasion and in a slightly different context, sometimes "affirmative race-conscious relief may be the only means available 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have [worked] . . . to the disadvantage of minority citizens.'"³⁴²

3. Summary

The Black working class is the largest segment of Black society. A typical working-class Black is married, a semi-skilled or unskilled blue-collar or service worker or perhaps a clerical worker, has a working spouse with a similar occupational status, and has an annual family income between \$11,000 and \$45,000. A family with these characteristics, *inter alia*, uses free recreational facilities, either rents or owns its own home, can afford a new TV set every ten years,

341. On another occasion, I explained the "whole person" concept as follows: Affirmative action, in its most fundamental form, simply instructs the employer to look beyond traditional qualifications and to look at the "whole person." This means that the employer should be conscious of the applicant's race or gender as well as such neutral qualities as motivation, how far the person has traveled to get to where he or she is today, and whether the person satisfies a legitimate institutional interest (e.g., educational diversity or maximization of the institution's total utility) or social responsibility (e.g., maximization of anti-discrimination values or acting as responsible neighbors in the community). Given the legacy of slavery and legalized segregation, this is the only manner in which most minorities can realistically compete with whites on an equal footing today.

Brooks, *Civil Rights Scholarship: A Proposed Agenda for the Twenty-first Century*, 20 U.S.F. L. REV. 397, 403 (1986)(citations omitted).

342. *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 450 (1986).

a new refrigerator every seventeen years, and a used car every four years, and has no savings.

Working-class Blacks are subject to socioeconomic vulnerability mainly in two areas of life: housing and education. In the housing area, smiling discrimination, steering, and other forms of complex racial discrimination — racial discrimination that is subtle and complex, at times sophisticated and at times unconscious or institutionalized, and often accompanied by nonracial factors — plus *de facto* segregation — are the dominant socioeconomic problems facing the Black working class. Two sets of socioeconomic problems face the Black working class in education. In primary education, the problem consists of poor or ineffective public schooling — the lack of “quality education” — by which I mean inferior instruction in the three “Rs,” little or no programs dealing with Black pride or awareness, and essentially no cultural diversity. In higher education, low Black enrollment is the major problem. These problems set the Black working class apart from the White working class.

Socioeconomic vulnerability within the Black working class is linked to a system of racial subordination. Legal doctrines, procedures, and processes designed to implement or to vindicate the racial omission tenet subordinate the Black working class. They give low priority to the housing and educational interests of working-class Blacks or create situations in which these Blacks are called upon to shoulder a disproportionate amount of housing discrimination and segregation, ineffective public education, and the denial of a college education.

Racial subordination in housing can emerge in several specific ways. The intent test places the task of proving housing discrimination under the equal protection clause somewhere between extremely difficult and impossible. Literally applied, another judicial doctrine, the strict scrutiny test, denies Blacks the use of racial occupancy controls — one of the few means of effectively counteracting complex racial discrimination and a powerful desegregation tool. Poorly structured and administered, the Fair Housing Act sanctions certain types of housing discrimination and segregation, makes private enforcement unrealistic, provides for weak public enforcement, and offers little deterrence against simple or complex racial discrimination and segregation.

Specific patterns of racial subordination can likewise be identified in education. In primary education, the intent test places a near-impossible burden on Blacks attempting to prove segregative intent

on the part of school officials. At the higher educational levels, undergraduate and graduate schools attempting to comply with the *Bakke* decision, either in fulfillment of a perceived legal obligation or as a matter of institutional policy, have abandoned use of the Black admissions quota or have placed too much weight on traditional academic indicators.

These racially subordinating features of the legal system accommodate or cause the housing and educational problems of the Black working class. Complex racial discrimination and *de facto* segregation are prolonged and possibly encouraged by antidiscrimination laws that leave working-class Blacks unequipped to fight housing discrimination and segregation. Poor public schooling is allowed to fester long after *Brown I* in part because proof of segregative intent, which is the key to unlocking educational remedies, is an extremely heavy burden to meet today. Finally, Black college enrollment is sure to continue to stagnate at post-*Bakke* low levels when colleges and universities jettison what has always been the most effective means of admitting promising Black students — racial quotas — or when the admissions process otherwise fails to take the full measure of the person applying. Given the difficulty of proving discriminatory intent and, most importantly, the great unlikelihood that a rejected Black high school student could afford to or would even consider suing a college for discrimination, the Black admissions quota may be the only effective way to counteract residual discrimination and racism in the admissions process. Individual high school or college graduates are simply not in a position to fend for themselves as regards the admissions process.

PART V BLACK UNDERCLASS

A. *Defining Characteristics*

The term “underclass” was not part of the civil rights discourse during the 1960s. Journalist Ken Auletta popularized the term in a 1982 book, entitled *The Underclass*.³⁴³ Auletta wrote about the hard-core unemployed, concentrating on what he perceived to be values and behavior quite different from that of mainstream society. Bill Moyers’ CBS documentary, “The Vanishing Black Family — Crisis in Black America,”³⁴⁴ is perhaps most responsible for making the term “underclass” a household word. Moyers’ 1986 documentary dramatized for the entire nation the attitudes, values, and behavioral pattern of Black teen-aged males and females from broken families.

343. K. AULETTA, *THE UNDERCLASS* (1982).

344. *CBS Reports: The Vanishing Black Family — Crisis in Black America* (Bill Moyers, reporter, January 1986) [hereinafter *The Vanishing Family*].

Although now a familiar term in public discourse, the term "underclass" is defined in different ways by scholars. Many of these definitions were discussed at a conference convened by the Joint Center for Political Studies on March 5, 1987 in Washington D.C.³⁴⁵ Professor William J. Wilson of the University of Chicago, Robert Aponte, Project Director of the Underclass Project at the University of Chicago, and Dr. Peter Gottschalk of the Institute of Poverty Research and Boston College, argued in favor of an income definition of underclass. "Individuals who comprise the underclass lack opportunities and live in neighborhoods with high concentrations of unemployment, crime, and deviant behavior — but the underlying problem is poverty."³⁴⁶

Other scholars disagreed with the suggestion that underclass and poverty are synonymous. Instead, they would define underclass as pathological behavior, a definition that could exclude as much as seventy-two percent of poor people. Professor Christopher Jencks of Northwestern University was one of the principal proponents of this definition of underclass:

If you don't believe pathological behavior is really a problem worth worrying about, the correct position to take is to stop worrying about the underclass and go back to talking about poverty, which is a perfectly feasible position to take. But it's a tactical error to import poverty back in under the rubric of the underclass.³⁴⁷

Still other conference participants settled upon a definition that would include only certain classes of the poor: the homeless; long-term welfare recipients; long-term jobless or underemployed persons, especially young high school dropouts; and participants in the illegal economy (such as, pimps, prostitutes, and drug dealers).³⁴⁸

Each approach is problematic. The income approach may be too inclusive. It may, for example, capture individuals or families who are poor for a short period of time. On the other hand, the behavioral approach may be too exclusive. It could exclude, for example, the working poor, whether short or long-term.

Each approach has a common problem, especially when focused on the Black underclass. To the extent that the definitions rely on government-conducted surveys, they can provide only rough approximations at best of the size of the Black underclass. Government population counters are reluctant to enter non-White neighborhoods,

345. The conference proceedings are reported at *Focus*, June 1987, at 8.

346. *Id.* at 9.

347. *Id.*

348. *Id.* at 10-11.

and non-Whites are reluctant to talk with government officials who ask personal questions. "The result is a substantial (twenty percent, perhaps) undercounting of the non-White population."³⁴⁹

Given these problems, I find the income definition to be the most "accurate." Its over-inclusiveness tends to offset to some extent undercounting of poor Blacks. The income approach is also most appealing for an important policy reason. The policy question one must answer in defining the Black underclass is, who among Black Americans is in most need of help? In my view, poor Blacks are in most need of help. As a group, they are unstable socially and economically; they are caught in a cycle of poverty and despair. I fear that if we begin to make distinctions among poor Blacks, sufficient attention may not be given to the needs of those who are deemed not to be among the favored classes.

Thus, in this article, the term "Black underclass" refers to Black Americans who either have no income, rely in whole or in part on meager amounts of public assistance, or earn wages at or below the poverty line — approximately \$11,000 annually for a family of four during the late 1980s.³⁵⁰ Using income as the measuring rod for class size, approximately one-third of all Black Americans have belonged to the underclass in the 1980s.³⁵¹ I hasten to add, however, that as with the Black middle and working classes, I am less concerned with a particular income level itself than with the socioeconomic characteristics, conditions, and problems a Black household normally buys into at a particular income level. Hence, the following statistical profile of underclass Blacks is just as important, if not more important, than class income:

- 14 percent of Black underclass households consist of family units headed by a husband and wife, of which: (a) an equal percentage (3 percent) of the husbands are either "not in the labor force" (meaning, not working and not actively looking for work)³⁵² "unemployed" (meaning, those who are without a job but are actively looking for work), semiskilled or unskilled blue-collar or service workers (which includes assembly-line workers, laborers, food handlers, and domestic workers), or retired; (b) an equal percentage (3 percent) of the wives are either keeping house, unemployed, semiskilled or unskilled blue-

349. S. Rose, *supra* note 59, at 35.

350. *Id.* at 7.

351. See, e.g., *id.* at 21; CENTER ON BUDGET AND POLICY PRIORITIES, FALLING BEHIND: A REPORT ON HOW BLACKS HAVE FARED UNDER REAGAN POLICIES 4 (1984). A statistical breakdown of Black and White classes appears *supra* in Part III A.

352. This group includes persons who are disabled, on public assistance, or between jobs. A similar group, called "discouraged workers," consists of persons who want to work but have stopped looking. See, e.g., S. Rose, *supra* note 59, at 12.

collar or service workers, or retired.³⁵³

- 41 percent of Black underclass households consist of female-headed families. Among the household heads, 58 percent are not in the labor force, 8 percent are unemployed, 25 percent are semiskilled or unskilled blue-collar or service workers, and 8 percent are clerical and sales workers (secretaries, sales clerks, telephone operators, postal workers, and so on).³⁵⁴
- 3 percent of Black underclass households consist of male-headed families in which none of the household heads are in the labor force.³⁵⁵
- 21 percent of Black underclass households consist of "single" women (meaning unmarried with no dependents) of which 33 percent are not in the labor force, 17 percent are unemployed, 17 percent are semiskilled or unskilled blue-collar or service workers, and 33 percent are retired.³⁵⁶
- 21 percent of Black underclass households consist of single men, of which 33 percent are not in the labor force, 17 percent are unemployed, 33 percent are semiskilled or unskilled blue-collar or service workers, and seventeen percent are retired.³⁵⁷

These statistics indicate that the Black underclass lives life at the low end of the American Dream. Most underclass Blacks live a life of poverty and despair, a life that is poor in income, education, housing, health, and municipal services, but rich in crime, drugs, teenage pregnancy, high school drop-outs, broken families, welfare dependency, and unemployment.³⁵⁸ This is life far removed from mainstream society, and a life caught between the cross-currents of race and class.

353. *Id.* at 21.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. See, e.g., Wilson, *The Urban Underclass*, in MINORITY REPORT 75 (L. Dunbar ed. 1984); *Frontline: Growing Up Poor* (PBS television broadcast, Feb. 2, 1986) (transcript No. 403, at 24-29; on file at Kratter Law Library, University of San Diego); U.S. NEWS & WORLD REP., Mar. 17, 1986, at 18-25; TIME, Sept. 16, 1985, at 32-36; TIME, July 8, 1985, at 54-56.

B. The Subordination Question

1. Dominant Class Problems

As the statistical profile of the Black underclass clearly reveals, not all underclass Blacks are unemployed, on welfare, or live in broken families. Yet, some theorists would isolate one or another of these socioeconomic conditions as the *sine qua non* of the Black underclass' problem. I believe, however, that these socioeconomic conditions describe only symptoms of the real problem underclass Blacks face, not the problem itself. A socioeconomic phenomenon more fundamental, ubiquitous, and sustaining than welfare, crime, teenage pregnancy, and so on provides a better understanding of the Black underclass' condition. In analyzing this phenomenon, it may be helpful to first consider three widely-accepted theories concerning the Black underclass's dominant class problem.

a. Three Current Theories

The first theory, advanced by the conservative Charles Murray in his book, *Losing Ground: American Social Policy, 1950-1980*,³⁵⁹ holds that welfare is the major problem confronting underclass Blacks. Mr. Murray argues that government welfare programs, especially AFDC, is the root of all evil in the Black underclass. According to Mr. Murray, welfare engenders everything from teenage pregnancy and its subsequent metamorphosis into female-headed families (or "family disintegration") to generations of weak men whose incentive to pull themselves up by their own bootstraps is blunted by the comfort of monthly handouts from the government.

There is statistical support for some of Mr. Murray's assertions. It is true, for example, that the percentage of Black families relative to the percentage of White families receiving AFDC payments has increased dramatically since the 1960s.³⁶⁰ It is also true that there has been an equally extraordinary increase in Black female-headed families compared to White female-headed families during this same period.³⁶¹

These statistics do not, however, establish a nexus between AFDC payments and teenage pregnancy or broken families. "In fact, welfare does not seem to be the key factor in forming female-headed families — since the number of [B]lack single mothers who are *not* on AFDC grew just as rapidly during the 1970s as those who

359. C. MURRAY, *LOSING GROUND: AN AMERICAN SOCIAL POLICY 1950-1980* (1984).

360. See *supra* text accompanying note 37.

361. *Id.* Of course, one of the problems with Black female-headed families is that a large percentage of them live in poverty. See, e.g., *supra* text accompanying note 39.

were."³⁶²

Furthermore, when one talks with Black teenagers — the main ingredient of Black teenage pregnancy and family disintegration — a clearer picture begins to emerge. The prospect of receiving a welfare check is not the motivating force behind careless sex or planned pregnancies. For Black teenage girls, the need to love and to be loved unconditionally are the primary motivating factors. For Black teenage boys, the need to establish one's manhood is the strongest incentive for fathering a baby. These youngsters learn from the streets that the shrewdness involved in convincing a reluctant girl to become intimate enough to have a baby is one of the few ways in which a Black teenager living in poverty can establish his manhood.³⁶³

One cannot help but wonder whether Mr. Murray has ever talked to Black teenagers. Perhaps he is like the government census counters who have never stepped foot into a Black ghetto.³⁶⁴ As Senator Daniel P. Moynihan has said: "How does Mr. Murray know? . . . The answer is that he does not know."³⁶⁵

Senator Moynihan has his own theory concerning the *sine qua non* of the Black underclass' social problem. Senator Moynihan broached his theory in 1965 as an Assistant Secretary of Labor. In a controversial report written for President Johnson, Mr. Moynihan concluded that family breakdown was the principal cause of poverty among Black Americans.³⁶⁶ He repeated this assertion five years later as an urban affairs specialist in the Nixon Administration. He stated, in his infamous "benign neglect" memorandum to the President, that: "Increasingly, the problem of Negro poverty is the problem of the female-headed family."³⁶⁷ Recently, in a book entitled *Family and Nation*,³⁶⁸ Senator Moynihan modified his theory to include White Americans. He now believes that family disintegration is so pervasive among Whites as well as Blacks that it is no longer mainly a racial problem.

The causal link between broken families and poverty has been contradicted, however, by a more recent study. A 1987 congressional study, conducted by the Joint Economic Committee, contends that a

362. U.S. NEWS & WORLD REP., Mar. 17, 1986, at 21.

363. See *infra* notes 379-404 and accompanying text.

364. See *supra* text accompanying note 349.

365. N.Y. Times, April 7, 1985, § 1 (Main), at 11, col. 2.

366. *Id.* at 1, col. 3. Portions of the report are reproduced in TIME, May 14, 1984, at 20.

367. N.Y. Times, Mar. 1, 1970, § 1 (Main), at 69, col. 2.

368. D. MOYNIHAN, FAMILY AND NATION (1986).

low-wage explosion, which began in 1979, is keeping more than thirty million Americans below the poverty line. "Between 1979 and 1985 — the most recent year for which Government data are available — 44 percent of the net new jobs created paid poverty-level wages."³⁶⁹ Also, "two-parent households accounted for 45% of the rise in the number of poor [during this period]. Single-parent families made up only 32% of the increase."³⁷⁰

While poverty-wage jobs may have increased during the 1980s and although poverty can grip two-parent as well as female-headed families, one point is not refuted by the congressional study. Poverty and, hence, underclass status fall disproportionately on Blacks, especially female-headed households. Not only do female-headed families currently constitute the largest portion of the Black underclass — approximately forty-one percent as opposed to approximately fourteen percent for two-parent families³⁷¹ — but also in 1985 — the last year of the congressional study — fifty-two percent of Black female-headed families live in poverty compared to only twenty-seven percent of White female-headed families.³⁷² Also, since the 1960s, a much larger percentage of Black families have received public assistance (for instance 11.6 and 23.6 percent in 1967 and 1983, respectively) than White families (such as 1.5 and 2.7 percent in 1967 and 1983, respectively).³⁷³

A third theory, which has more substance to it than the previous ones, is advanced by William Wilson in his latest book, entitled *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy*.³⁷⁴ Professor Wilson asserts that the major problem confronting the Black underclass is joblessness. He believes that unemployment resulting from structural changes in the economy — particularly the movement away from such "smokestack" industries as automobiles, rubber, and steel to such service oriented industries as computers and finances — is the special class problem the Black underclass faces.

Yet, it is not enough to merely point out that Black men were overrepresented in industries that have declined in recent years. Not all underclass Blacks are unemployed. Most are stuck in low-skilled jobs, and many of these jobs are going begging.³⁷⁵ Moreover, Wil-

369. Bluestone & Harrison, *A Low-Wage Explosion: The Grim Truth About the Job 'Miracle'*, N.Y. Times, Feb. 1, 1987, § 8 (Bus.), at 3, col. 1.

370. TIME, Jan. 5, 1987, at 49.

371. See *supra* text accompanying notes 352, 354.

372. U.S. NEWS & WORLD REP., Mar. 17, 1986, at 21. See also *supra* text accompanying note 39.

373. U.S. NEWS & WORLD REP., Mar. 17, 1986, at 21.

374. W. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

375. Uchitelle, *America's Army of Non-Workers*, N.Y. Times, Sept. 27, 1987, § 3

son's theory is too narrow to sufficiently explain teenage pregnancy, Black-on-Black crime, and other major problems within the Black underclass.

Why are teenage males unwilling to take low-skilled jobs for which they are qualified? Why are older underclass Blacks so vulnerable to being locked into these jobs? Why, in short, are underclass Black Americans so susceptible to the socioeconomic hardships about which Murray, Moynihan, and Wilson write? I attempt to answer this question next, while at the same time expressing a different theory about the dominant class problem of the Black underclass.

b. A Different Theory

Welfare dependency, female-headed families, and unusual vulnerability to the low-wage explosion, like crime and malnutrition, merely give *evidence* of a deeper problem within the Black underclass. When one pulls this evidence together, it becomes clear that it is not any one of these cultural phenomena that constitutes the dominant class problem of underclass Blacks. Rather, it is the force underlying these phenomena — a *proclivity toward dysfunction and self-destruction*, a dysfunctional behavioral pattern and value system that is utterly self-defeating — that fundamentally is the root of most evil within the Black underclass. The current of dysfunction and self-defeating acts and attitudes undulating within the Black underclass is more organic and wide-spread than the high rate of welfare dependency, female-headed families, unemployment, and other grim class conditions. Dysfunction and self-destruction within the Black underclass help to explain these cultural phenomena and why the Black underclass is so vulnerable to the low-wage explosion.

In discussing dysfunction and self-destruction within the Black underclass, it is important not to confound issues of responsibility and blame. While underclass Blacks share in the responsibility for resolving their class problem, society is mainly to blame for the fact that the problem even exists. As discussed in greater detail later on,³⁷⁶ today's Blacks inherited tremendous social and economic disadvantage — such as, poor housing, inferior education, and low-paying jobs — from slavery and, in particular, Jim Crow.

It is also important to understand that the Black underclass' dys-

(Bus.), at 1, col. 2. One McDonald's restaurant in Hartford, Connecticut was so in need of help that it offered to pay \$7.00/ hour as a starting wage.

376. See *infra* text accompanying notes 405-39.

functional and self-destructive life-style is sustained in large part by another legacy of prior subordinating systems — *racial sensibility*. This is a most insidious cultural disease. Its symptoms include the inability to manage mixed or negative feelings regarding one's Blackness — such as, low self-esteem, self-hate, anger, and defiance — to draw strength, pride, power, determination, or energy from Black culture, or, in general, to successfully adapt to the modern world.³⁷⁷ Racial sensibility helps to explain why White ethnic groups, Vietnamese refugees and other newer immigrants, and even Black West Indians, out perform Blacks as a whole.³⁷⁸

A close examination of the behavioral patterns, attitudes, and value system of Black underclass teenagers provides important insights into the Black underclass' proclivity toward dysfunction and self-destruction. Together, female and male teenagers generate most of the negative cultural traits within the Black underclass — teenage pregnancy, high school dropouts, and a large share of welfare dependency, crime, drugs, malnourished babies, and female-headed households.³⁷⁹ The pattern of dysfunction and self-destruction begins with teenage pregnancy.

There is little mystery as to why teenage girls in the Black underclass bear children: they seek to compensate for only partially nurturing homelives. True, the lack of proper sex education is a factor in some teenage pregnancies.³⁸⁰ But studies have shown that in most cases teenage girls get pregnant in spite of prior sex education, formal or informal. The desire to love and to be loved is the main reason so many Black teenage girls get pregnant. This desire comes through strongly in numerous responses to the question, "Why did you get pregnant?"

The response of a Black teenager from Atlanta is typical: "I didn't

377. See *infra* text accompanying notes 391-96 and 426-29.

378. See, e.g., L. THURLOW, *THE ZERO SUM SOCIETY* 184-187 (1980); Kotken, *The Reluctant Entrepreneurs. Are American Blacks Still Struck on the Bottom Rung of the Economic Ladder Because So Few Start Business on Their Own?*, INC. MAG., Sept. 1986, at 81; FORTUNE, Nov. 24, 1986, at 148; U.S. NEWS & WORLD REP., Apr. 2, 1984, at 41; JET, July 1, 1985, at 5.

379. See, e.g., Overbea, *Youths Hold Key to Black Family Survival*, Christian Sci. Monitor, Apr. 1, 1987 at 6, col. 1; *Growing Up Poor*, *supra* note 350; N.Y. Times, May 19, 1985, § 1 (Main), at 16, col. 1; TIME, Dec. 9, 1985, at 78-90; TIME, May 14, 1984, at 20. At the release of "The State of Black America - 1986," National Urban League President John Jacob remarked that the plight of the young Black man is one of the most pressing problems facing America today. See, e.g., San Diego Union/Tribune, Feb. 2, 1986, at G-2, col. 4. The role of Black teenagers in Black family breakdown was highlighted in a controversial television news report that aired on January 25, 1986. See *The Vanishing Family*, *supra* note 344. For an excellent discussion of the program see, e.g., Raspberry, *America's Black Family Crisis*, San Diego Union, Jan. 24, 1986, at 8, col. 4.

380. See, e.g., TIME, Dec. 9, 1985, at 81.

think my mother noticed me."³⁸¹ So too is the statement of another teenager from Newark: "Children will smile when no one else will. . . . They will always be there."³⁸² Janet Schultz, a nurse practitioner in Chester, Pennsylvania who has treated scores of pregnant teenagers, sums up her experience in the following manner:

Children get pregnant — teenagers get pregnant because they want to get pregnant; they want to have babies. It's not for lack of birth control. Every child knows where to get birth control. They could even tell us where to get birth control. It's available; it's not expensive — in fact, a teenage girl who would like to get the birth control pill does not need . . . permission from her parent to be treated at a medical facility for gynecologic care in order to get birth control pills. She's what we call an 'emancipated minor' when it comes to sexual matters, and she can sign for her own care and therefore get birth control pills. The girls want to have babies.³⁸³

If children bearing children is a self-defeating act, especially when the child is born into a dead-end, brutally deficient environment, it is only the front end of a series of other self-destructive acts to come. Teenage mothers ignite a series of interrelated, intergenerational problems. The first problem, which begins with the pregnancy itself, is high school dropout. Pregnancy is the single most important reason teenage girls drop out of school.³⁸⁴ Teenage pregnancy can also have an adverse affect on the unborn baby's health and, consequently, on the social cost of infant care. Pregnant teenagers are "far less likely than other expectant mothers to receive prenatal care, thus increasing the risk of bearing low-birth-weight babies requiring extensive medical care at public expense."³⁸⁵ Low-birth-weight babies experience not only physical but mental developmental problems, called the "failure to thrive syndrome."³⁸⁶

The class problems engendered by the teenage mother do not end here. Having failed to complete high school and lacking her own means of transportation, access to day-care services, or marketable skills to obtain a job, the teenage mother is compelled to go on welfare. In New York City, for example, "Seventy percent of . . . [new teenage mothers] can be expected to end up on public assistance within 18 months . . ."³⁸⁷

Going on welfare does not solve the problem of malnourished chil-

381. TV GUIDE, June 14-20, 1986, at A-69.

382. *The Vanishing Family*, *supra* note 344.

383. *Growing Up Poor*, *supra* note 358, at 17.

384. See, e.g., Stein, *Children of Poverty: Crisis in New York*, N.Y. TIMES MAG., June 8, 1986, at 68.

385. *Id.*

386. *Growing Up Poor*, *supra* note 358, at 5.

387. Stein, *supra* note 384, at 68.

dren, another class problem to which teenage mothers contribute. One official explains the problem of malnourished children as follows: "We have multiple kids who are malnourished and . . . some of them are malnourished because the families don't have enough money for food. Sometimes it's because they don't budget money well, but they don't have a whole lot to budget."³⁸⁸ Also, underclass Blacks, like poor people in general, are not nutritional experts or have access to the best food buys.³⁸⁹ Nor do these Blacks or other poor people have "the kind of sophistication or education that allows them to work very well with . . . [local nutritional agencies]."³⁹⁰

Children sent into the world by Black teenage parents are likely to become maladjusted members of society. Teenagers are ill-prepared to teach their children a very important racial survival skill: how to deal with racial sensibility.³⁹¹ Having to deal with racial sensibility is a central distinction between underclass Blacks and Whites; this racial phenomenon simply does not figure into the latter's life chances.³⁹²

The importance of teaching Black children how to deal with racial sensibility — the psychological problems of being Black in a racist society — is made clear by two leading Black psychiatrists, Dr. James P. Comer of Yale University and Dr. Alvin Poussaint of Harvard University, who is also an advisor for television's *The Bill Cosby Show*.³⁹³ In their book, *Black Child Care*,³⁹³ Drs. Comer and Poussaint maintain that while good childrearing principles "are fundamentally the same for all,"³⁹⁴ Black parents "will occasionally need to act in special ways."³⁹⁵ Because our society "so profoundly threatens [Black] . . . self-esteem," Drs. Comer and Poussaint believe that Black child parenting requires special efforts chiefly in providing for the child's psychological well-being. The Black child, who is "still made to feel inferior to [W]hites," must be "trained to cope with [W]hite oppression." Parents, *inter alia*, must "[pass] on to a growing child both the strengths of the old culture and the rules and

388. *Growing Up Poor*, *supra* note 358, at 6.

389. Studies have shown that poverty-stricken areas have above-average food prices. See, e.g., S. Rose, *supra* note 59, at 7-8.

390. *Growing Up Poor*, *supra* note 358, at 6.

391. See also *supra*, text accompanying note 378, and *infra* text accompanying notes 426-29.

392. See *infra* text accompanying notes 426-29.

393. J. COMER & A. POUSSAINT, *BLACK CHILD CARE, HOW TO BRING UP A HEALTHY BLACK CHILD IN AMERICA, A GUIDE TO EMOTIONAL AND PSYCHOLOGICAL DEVELOPMENT* (1975) [hereinafter *BLACK CHILD CARE*].

394. Children universally need food, clothing, shelter, protection from physical and psychological damage, the ability to trust and feel affection, and to be taught how to control their aggressive and impulsive energy in order to be able to learn, work, and play in gradually more mature ways. *Id.* at 22-23.

395. *Id.* at 23.

techniques essential for successful adaptation in the modern world." These techniques include the art of being "practical as well as cunning", learning "how to win some sort of acceptance from belligerent [W]hites," and even acquiring the habit of containing one's "aggression around [W]hites while freely expressing it among [B]lacks."³⁹⁶

It is very unlikely that teenage parents, who are forced into a kind of premature adulthood can master or effectively communicate these ultra sophisticated rules and techniques to their children. This is especially true given the complexity of post-1960s racial dynamics. Even older and wealthier Blacks find this parental burden to be particularly difficult in today's racial climate.³⁹⁷

As the Black infant suffering from "failure to thrive syndrome" grows into the malnourished child on its way to becoming the racially-unschooled teenager, the future looks more bleak than ever. Educational achievement, given insufficient intellectual, cultural, and emotional growth accumulating over the years, seems remote. Many teenagers simply drop out of school to escape the diurnal frustrations and humiliations that come with educational failure. They seem to be unaware or unafraid of the fact that a snowball in hell has a better chance of surviving than a high school dropout has of finding a good-paying job. Other than a strong sense that money is a commodity that one should not do without, there is little guidance or nurturing from the home. Indeed, homelife has become quite unpleasant, with tensions mounting as the family struggles through each day of poverty and despair. Thrown into a state of premature adulthood, the teenager looks for ways to survive and to embellish life in a nonabundant environment. Females often turn to childrearing, and thus become pregnant, as a way of arriving at a productive life.³⁹⁸ Males frequently look elsewhere — the streets.

Coping in the streets is a cruel way for teenagers to try to develop personal growth and fulfillment. They succeed only in becoming children of the streets, playing host to a multitude of social and cultural evils: crime, drugs, vandalism, street hustle, bitterness and resentment against society in general and White society in particular, and, of course, teenage pregnancy and all its attendant problems. Claude Brown, whose highly acclaimed autobiography, *Manchild in the*

396. *Id.* at 19-21.

397. See, e.g., Morgan, *The World Ahead: Black Parents Prepare Their Children for Pride and Prejudice*, N.Y. TIMES MAG., Oct. 27, 1985, at 32.

398. See *supra* text accompanying notes 379-83.

Promised Land,³⁹⁹ made America aware of the problems of a Black youngster growing up on the streets of Harlem in the 1940s and 1950s, describes the environment and some of the motivations and coping techniques of today's premature adult male:

Today's manchild is a teen-ager between the ages of 13 and 18, probably a second-generation ghetto dweller living with his unskilled, laboring mother and three or four sisters and brothers, maybe one or two cousins, all sharing a tiny three-, four- or five-room apartment in a dilapidated tenement of low-income, city-owned housing development, commonly called 'the projects.'

The motivations, dreams and aspirations of today's young men are essentially the same as those of the teen-agers of their parents' generation — with a few dramatic differences. They are persistently violent. They appear driven by, or almost obsessed with, a desperate need for pocket money that they cannot possibly obtain legally.

Like his progenitor, [today's manchild] seeks the answers to life's "unknowable whys" through informal mysticism and mind-altering media collectively called getting 'high.'

Yet, the unimaginably difficult struggle to arrive at a productive manhood in urban America is more devastatingly monstrous than ever before. All street kids are at least semi-abandoned, out on those mean streets for the major portion of the day and night. They are at the mercy of a coldblooded and ruthless environment; survival is a matter of fortuity, instinct, ingenuity and unavoidable conditioning. Consequently, the manchild who survives is usually more cunning, more devious and often more vicious than his middle-class counterpart. These traits are the essential contents of his survival kit.⁴⁰⁰

Needless to say, the Black underclass is not the only group in our society exhibiting a proclivity toward dysfunction and self-destruction. Male teenagers between the ages of fifteen and eighteen, regardless of socio-economic class, have the highest involvement in crime.⁴⁰¹ And, of course, the White underclass, with all its attendant ills of poverty, alienation, broken homes, welfare dependency, and criminal behavior, is also prone to self-defeating mores.⁴⁰² None of these groups, however, behave in response to a set of attitudes and a value system quite like that which is found in the Black ghetto.

The ghetto is a constant reminder to all Blacks of prior subordinating systems. To underclass Blacks, it is also a symbol of society's indifference and frequent hostility toward poor Blacks. Skirmishes with the police — angry White men in screaming white cars — pervasive economic privation, and the many failed attempts to "make it" in a perplexing White world — in school, on the job, and so on — all help to create a deeply ingrained aversion, particularly in

399. C. BROWN, *MANCHILD IN THE PROMISED LAND* (1965).

400. Brown, *Manchild in Harlem*, N.Y. Times, Sept. 16, 1984, at 38-40. See also N.Y. Times, May 19, 1985, § 1 (Main), at 16, col. 1; TIME, Sept. 16, 1985, at 32.

401. TIME, Feb. 23, 1987, at 28.

402. *Id.* at 29. See also *Growing Up Poor*, *supra* note 358.

Black males, for the attitudes and values of the larger, alien White world. Life in the ghetto can engender a very real sense that Whites have purposefully limited opportunities for Blacks, that society has closed off every avenue of stardom for most Blacks, except "stardom in crime." John Edgar Wildeman captures many of these complex attitudes and values in his book, *Brothers and Keepers*.⁴⁰³

You remember what we were saying about young [B]lack men in the street-world life. And trying to understand why the 'square world' becomes completely unattractive to them. It has to do with the fact that their world is the GHETTO and in that world all the glamour, all the praise and attention is given to the slick guy, the gangster especially, the ones that get over in the 'life.' And it's because we can't help but feel some satisfaction seeing a brother, a [B]lack man, get over on these people, on their system without playing by their rules. No matter how much we have incorporated these rules as our own, we know that they were forced on us by people who did not have our best interest at heart. . . .

In the real world, the world left for me, it was unacceptable to be 'good,' it was square to be smart in school, it was jive to show respect to people outside the street world, it was cool to be cold to your woman and the people that loved you. The things we liked we called 'bad.' 'Man that was a bad girl.' The world of the angry [B]lack kid . . . was a world in which to be in was to be out — out of touch with the square world and all of its rules on what's right and wrong. The thing was to make sure it's contrary to what society says or is. . . .

. . . The world's a stone bitch. Nothing true if that's not true. The man had you coming and going. He owned everything worth owning and all you'd ever get was what he didn't want anymore, what he'd chewed and spit out and left in the gutter for niggers to fight over. Garth had pointed to the street and said, If we ever make it, it got to come from there, from the curb.⁴⁰⁴

These attitudes and values are astonishing yet differentiating. They help to motivate dysfunction and self-destruction within the Black underclass. They also distinguish this segment of Black society from other groups that engage in dysfunctional or self-destructive behavior.

While there is no denying that these negative attitudes and values are part of the fabric of the Black underclass, it would be wrong to conclude from that that the Black underclass is solely to blame for this sad state of affairs. Prior and current racial subordination have played significant roles in the creation of these attitudes, values, and accompanying behaviors — this proclivity toward dysfunction and self-destruction.

403. J. WIDEMAN, *BROTHERS AND KEEPERS* (1984).

404. *Id.* at 57-58, 64.

2. *Racial Subordination*

a. *Slavery and Jim Crow*

A sizable segment of Black society did not just decide to join the ranks of the underclass at the end of the 1960s. Many Blacks had no choice; they came out of Jim Crow heavily encumbered by poverty and despair. Given the duration and intensity of slavery and Jim Crow,⁴⁰⁵ it would not have been too difficult to anticipate in the late 1960s that the command of these prior subordinating systems, especially Jim Crow, would have a residual effect on Black Americans and society *en toto* beyond the 1960s.

Indeed, in its 1968 report on the causes of America's race riots during the 1960s, the Kerner Commission cited as some of the lingering effects of slavery and Jim Crow: acute unemployment; high underemployment; shabby housing; second-rate education; poor municipal services; inadequate welfare; and, of course, racism.⁴⁰⁶ Significantly, the Commission said that "segregation and poverty converge on the young to destroy opportunity and enforce failure. Crime, drug addiction, dependency on welfare, and bitterness and resentment against society in general and [W]hite society in particular are the result."⁴⁰⁷

These findings come alive when unemployment, poverty, income, occupational status, wage scale, housing, and education statistics are considered. Black society came out of Jim Crow with: an unemployment rate roughly twice as high as the rates for Whites;⁴⁰⁸ a poverty rate for individuals and intact families more than three times the rate for White individuals and intact families;⁴⁰⁹ an income level for males and intact families 58.1 percent and 61.4 percent, respectively, as high as the rate for their White counterparts;⁴¹⁰ almost triple the percentage of men and women concentrated in the lowest-paying,

405. See, e.g., J. WILLIAMS, *EYES ON THE PRIZE, AMERICA'S CIVIL RIGHTS YEARS 1954-1965* (1987); A. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978); W. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1969); J. FRANKLIN, *FROM SLAVERY TO FREEDOM, A HISTORY OF NEGRO AMERICANS* (1969); J. LESTER, *TO BE A SLAVE* (1968); H. APTHEKER, *NAT TURNER'S SLAVE REBELLION* (1966); K. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* (1965); K. STAMPP, *THE PECULIAR INSTITUTION, SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

406. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, SUMMARY OF REPORT 9-16 (1968).

407. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1968). See also, LIFE, Mar. 8, 1968. For an account of how local governments, through the unequal distribution of municipal services, helped to create the impoverished conditions under which many Blacks now live, see C. HAAR & D. FESSLER, *THE WRONG SIDE OF THE TRACKS* (1986).

408. POPULATION RPT., *supra* note 39, at 69, 70.

409. *Id.* at 29, 49, 50.

410. RAND RPT., *supra* note 37, at 104.

least-skilled jobs (primarily private domestic service and farming) compared to the percentage of White men and women holding such jobs;⁴¹¹ a wage scale that permitted its males to earn only 57.5 percent as much as comparably experienced White males and, taking both experience and education into account, only between sixty and seventy percent of wages paid to similarly-situated White males;⁴¹² an owner-occupied housing percentage that was 1.7 times less than the rate for Whites and a rental percentage that was 1.7 times more than the percentage for Whites;⁴¹³ a smaller percentage of urban (1.3 times smaller) and rural (5.1 times smaller) housing containing all essential plumbing facilities compared to White urban and rural housing;⁴¹⁴ more than twice as much overcrowding in urban housing (whether owner-occupied or rental) and more than three times as much overcrowding in rural housing (whether owner-occupied or rental) than for comparable White housing;⁴¹⁵ and a smaller percentage of high school (more than two times smaller) and college (almost three times smaller) graduates than the percentage for White high school and college graduates.⁴¹⁶

The present-day effects of prior racial subordination cannot be gainsaid by the fact that some Blacks, even underclass Blacks, have been able to excel in spite of these dreadful socioeconomic conditions. Simply put, not all Blacks are the same. "Sure, a common bond of genes, of suffering, of grievances and yearnings does tie together all [B]lacks in this country."⁴¹⁷ But some Blacks are stronger or luckier than others. "Blacks have always distinguished between the person who is in the ghetto and the one with the ghetto in himself. The former is a striver, the latter a defeatist."⁴¹⁸ Carl Rowan, a Black syndicated newspaper columnist, felicitously observes that ". . . when a thousand are bound in chains, only a few Houdinis will emerge. Those who have done so simply turned out to be stronger than their shackles were."⁴¹⁹

Nor are the current effects of past subordinating systems lessened by the fact that other ethnic groups, who can also lay claim to a

411. POPULATION RPT., *supra* note 39, at 74.

412. RAND RPT., *supra* note 37, at 6, 23-26.

413. POPULATION RPT., *supra* note 39, at 137.

414. *Id.* at 139.

415. *Id.* at 141.

416. *Id.* at 93.

417. Rowan, *The Blacks Among Us*, READER'S DIGEST, June, 1985, at 72.

418. N.Y. Times, Nov. 2, 1986, § 4 (Wk. in Rev.), at 24, col. 1.

419. Rowan, *supra* note 417, at 74-75.

legacy of suffering, have mounted barriers to gain entrance into mainstream American society. The Black experience in this society is wholly different from that of other ethnic groups, including the recent Asian immigrants who have done so well in record time. No other ethnic group was brought to this country against its own wishes and then enslaved and humiliated so thoroughly by society and government.⁴²⁰

Too many Americans seem to have forgotten or perhaps have never read the Kerner Commission's findings on this subject. In addressing the question, "why have so many Negroes, unlike the European immigrants, been unable to escape from the ghetto and from poverty," the Commission cited, *inter alia*, certain racial and cultural factors:

The Disability of Race. The structure of discrimination has stringently narrowed opportunities for the Negro and restricted his prospects. European immigrants suffered from discrimination, but never so pervasively. . . .

Cultural Factors: Coming from societies with a low standard of living and at a time when job aspirations were low, the immigrants sensed little deprivation in being forced to take the less desirable and poorer-paying jobs. Their large and cohesive families contributed to total income. Their vision of the future — one that led to a life outside of the ghetto — provided the incentive necessary to endure the present.

Although Negro men worked as hard as the immigrants, they were unable to support their families. The entrepreneurial opportunities had vanished. As a result of slavery and long periods of unemployment, the Negro family structure had become matriarchal; the males played a secondary and marginal family role — one which offered little compensation for their hard and unrewarding labor. Above all, segregation denied Negroes access to good jobs and the opportunity to leave the ghetto. For them, the future seemed to lead only to a dead end.

Today, [W]hites tend to exaggerate how well and quickly they escaped from poverty. The fact is that immigrants who came from rural backgrounds, as many Negroes do, are only now, after three generations, finally beginning to move into the middle class.

By contrast, Negroes began concentrating in the city less than two generations ago, and under much less favorable conditions. . . .⁴²¹

A myriad of other consequences flow from the unique experiences of the Black American. One is the lack of a legacy of opportunities from which today's Blacks can benefit. Government-imposed racial exclusion permitted prior generations of Blacks to amass too few opportunities for themselves, leaving even less to bequeath to future generations of Blacks.⁴²²

"Sorriness" is another deleterious consequence of prior racial subordination. This is an adolescent-arresting disease known in the Black community, particularly in the South, that helps to explain some of the dysfunctional behavior of underclass Black males —

420. See *supra* sources cited note 405.

421. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, SUMMARY OF REPORT 15-16 (1968).

422. See *supra* sources cited note 405.

such as, Black-on-Black violence resulting from the failure of Black men to ventilate their anger and frustration in a mature manner.⁴²³ James Baldwin describes this cultural disease in his book, *The Evidence of Things Not Seen*.⁴²⁴

It is a disease that attacks Black males. It is transmitted by Mama, whose instinct — and it is not hard to see why — is to protect the Black male from the devastation that threatens him the moment he declares himself a man. All of our mothers, and all of our women, live with this small, 1 doom-laden bell in the skull, silent, waiting, or resounding, every hour of every day. Mama lays this burden on Sister, from whom she expects (or indicates she expects) far more than she expects from Brother; but one of the results of this all too comprehensible dynamic is that Brother may never grow up — in which case, the community has become an accomplice to the Republic.⁴²⁵

Another cultural disease that, once again, afflicts mainly the Black underclass is the inability to deal effectively with racial sensibility. Drs. Comer and Poussaint have discussed the importance of parental instruction in the art of dealing with racial sensibility.⁴²⁶ Another scholar has suggested that the failure to deal with this "inheritable" disease can cause motivational disabilities particularly in young adult males. These Blacks, for example, may be "less willing to compete aggressively for the opportunities that are open or less willing to submit to industrial discipline."⁴²⁷ Moreover, parents who themselves have not been able to handle racial sensibility may infect the entire family structure — their mishandling of their own disease may have an impact on "a child's aspirations and on the guidance available."⁴²⁸ This disease, in short, is a major force in the Black underclass' pattern of dysfunction and self-destruction.⁴²⁹

Given the enormous social disadvantage Black society carried into post-1960s America, it should surprise no one that a significant portion of this dismal condition remains with us today. What may sur-

423. See, e.g., *When Brothers Kill Brothers*, TIME, Sept. 16, 1985, at 32-36.

424. J. BALDWIN, *THE EVIDENCE OF THINGS NOT SEEN* (1985).

425. *Id.* at 19.

426. See *supra* text accompanying notes 391-96. See also *supra* text accompanying note 377.

427. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-40 (1971).

428. *Id.* at 240.

429. For a more detailed discussion of racial sensibility, see, e.g., Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419, 425-27 (1986). See also *supra* text accompanying notes 377, 391-96. For a discussion of other deleterious psychosocial consequences of racism, see NATIONAL INSTITUTE OF MENTAL HEALTH, *INSTITUTIONAL RACISM AND COMMUNITY COMPETENCE* (O. Barbarin, P. Good, O. Pharr & J. Siskind eds. 1981); A. THOMAS & S. SILLEN, *RACISM AND PSYCHIATRY* (1972); J. KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1970).

prise some is the role formal equal opportunity plays in sustaining the residue of prior racial subordination and in creating new forms of racial subordination.

b. Formal Equal Opportunity

Although the Black underclass, like the Black middle and working classes, is interested in having real (as opposed to formal) equal access to employment, housing, and education, clearly the major civil rights interest of underclass Blacks lies elsewhere. The Black underclass' most immediate civil rights interest is in attaining a better level of existence. As a racial class, the Black underclass is most interested in the opportunity to achieve a decent standard of living, which our liberal democratic society promises to all.

Formal equal opportunity subordinates this civil rights interest. Racial integration in particular, the sibling tenet of racial omission,⁴³⁰ can be incompatible with the Black underclass' primary civil rights interest (decent living), and such incompatibility can contribute to the major socioeconomic problem within this segment of Black society (dysfunction and self-annihilation).

It might seem absurd to some for anyone to argue that racial integration subordinates Black Americans. After all, one might ask, isn't integration the very thing for which Blacks struggled through the centuries of slavery and Jim Crow?

In truth, Black Americans have always viewed the struggle against Jim Crow as a demand not for integration but for desegregation. Desegregation is a much broader concept than integration. Desegregation is liberty or freedom. It is human dignity engendered by the removal of degrading, artificial legal restraints on where Blacks can go and what Blacks can do in our society. Desegregation is the eradication of government-sponsored racism that excludes generations of Black Americans from mainstream society.⁴³¹

Desegregation frees Blacks to pursue either integration or separation or some combination of the two. Thus, when Black college students decide to sit at an all-Black dining table or to live in an all-Black dormitory, their actions are consistent with the civil rights struggle. They are also in line with efforts by other ethnic groups to create their own institutions for self-support. Contrary to what some

430. See *supra* text accompanying notes 33-34 for a definition of racial integration.

431. C. Vann Woodward defines segregation and, by implication, desegregation in terms of "physical distance, not social distance - physical separation of people for reasons of race." He observes that segregation's "opposite is not necessarily 'integration' as the word is currently used, nor 'equality.' Nor does the absence of segregation necessarily imply the absence of other types of injustice or the lack of a caste structure of a society." C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* vii-viii (2d rev. ed. 1966).

might think, Black separatism is not a form of civil rights heresy.

Racial integration subordinates the civil rights interest of under-class Blacks by depleting Black communities of vital resources — resources that are necessary for sustaining a vibrant American middle-class culture. Racial integration, in other words, has been something of a boon for those Blacks least handicapped by the emotional and physical hardships of slavery and Jim Crow. It has given these Blacks, mainly middle-class and working-class Blacks, the opportunity to move out of previously-segregated communities. But the departure of so many talented community leaders from Black communities since the waning days of Jim Crow has resulted in a concomitant loss of valuable community resources. There has not only been a steady depletion of economic resources — money that could be recycled in Black communities — but, more importantly, there has also been a drain of individuals capable of supplying wisdom and guidance to young ghetto Blacks.

It is impossible to overstate the importance of middle-class Blacks to Black communities. Middle-class Blacks were leaders and role models in segregated communities. In words and, more importantly, by life style they helped to shape and to direct the attitudes, behavioral pattern, and value system of other Blacks living in the community. They interjected crucial “mainstreaming” — American middle-class — elements into the Black community, not occasionally but continuously. As one observer explains:

A generation ago, racist law and custom confined both [the Black striver and the Black defeatist] to the same neighborhoods. Strivers set the tone — in commerce, religion, social life, politics. They were role models. They provided the leavening that made Harlem, instead of the archetypal slum, into a varied, textured community that was [B]lack America's cultural capital.⁴³²

Above all, middle-class Blacks were immensely important role models for the children of poverty. Children become only what they can imagine themselves to be. And they can imagine only what they see in their environment. If they can imagine themselves as unemployed recipients of welfare checks or working menials, “then they will probably subside into that fate, following that peasant logic by which son follows father into a genetic destiny.”⁴³³ Regardless of what they see in their parent(s), if Black children see other Black adults “going out every morning to a job and bringing in a paycheck

432. N.Y. Times, Nov. 2, 1986, § 4 (Wk. in Rev.), at 24, col. 1.

433. Morrow, *The Powers of Racial Example*, TIME, Apr. 16, 1984, at 84.

to pay for their various needs,"⁴³⁴ if they see other adult Blacks "become doctors and scientists and lawyers and pilots and corporate presidents — become successes — then young [B]lacks will begin to comprehend their own possibilities and honor them with work."⁴³⁵

Drs. Comer and Poussaint, in their book *Black Child Care*,⁴³⁶ make this essential point in a concept that can be called "significant others." This concept is another way of stressing the importance of community support in the emotional and psychological development of Black children — in other words, in teaching Black children how to deal with the problem of racial sensibility.⁴³⁷ Even Black children raised in the poorest of homes, who may grow up with strong feelings that their parents are unable to provide for their economic and social well-being, can learn techniques essential for a Black person's successful adaptation in today's world. These children can imbibe the work ethic and an "attitude of [B]lack pride, self-confidence, and assertiveness" from others in their communities.⁴³⁸

In short, significant others, who provide an essential escape hatch for underclass Black children, were in abundant supply in Black communities during Jim Crow. Housing segregation, to the unintended benefit of scores of Black children, trapped these human resources within Black communities. Black men and women of substance — lawyers, doctors, dentists, businesspersons, school teachers, and other skilled workers — were admired and imitated in segregated communities. If not *ex cathedra*, they spoke and acted with considerable authority on matters of Black survival and success in a racist world. They were symbols of Black achievement and offered young Blacks visible alternatives to a life of semi-illiteracy, crime, drug addiction, welfare dependency, and abject poverty. Clearly, but for racial integration, middle-class culture would still be a significant force in Black communities today — there simply would be nowhere else for the Black middle class to live. Dr. Comer strikes a similar note when he observes:

After World War II, . . . [s]uccessful [B]lacks began moving out of the inner-city, taking their money, leadership and role models, leaving the poor isolated and alienated. Whites began moving to the suburbs, taking quality education and jobs with them. These trends left certain parents — [B]lack and [W]hite — less able to transmit desirable values to the children.⁴³⁹

434. *Growing Up Poor*, *supra* note 350, at 4.

435. Morrow, *supra* note 433, at 84.

436. See BLACK CHILD CARE, *supra* note 393.

437. See *supra* text accompanying notes 377, 391-96 for a discussion of the concept of racial sensibility.

438. See, e.g., BLACK CHILD CARE, *supra* note 393, at 19-21.

439. Comer, *Black Americans' Problems Are the Orphan of History*, L.A. Times, Feb. 14, 1986, pt. II, J, at 10, col. 1.

3. *Summary*

If some perverse soul wanted to draw up a recipe for socioeconomic dysfunction and self-destruction, it might be this: Take one group of Afro-Americans; add a tablespoon of poverty and a cupful of despair; season with a shovelful of racial subordination; allow to stew. You have the Black underclass.

Black Americans who live below the poverty line, are typically single or live in single-parent homes, and are either unemployed, semi-skilled or unskilled blue-collar or service workers, or retired. They exhibit a behavioral pattern, a set of attitudes, and a value system that offer few springboards from which to launch a successful life. Underclass Blacks live a life of despair; one that moves toward socioeconomic dysfunction and self-destruction. It is a life far removed from mainstream society.

The system's role in creating such social and cultural pathology cannot be gainsaid. Three and one-half centuries of government-imposed racial exclusion from mainstream society can only have predictable present-day consequences. Ending just in the 1960s, government racism left Black America with tremendous social and economic disadvantage. Poor Blacks were left worse off than better educated Black Americans. While it has taken White immigrants from low socioeconomic backgrounds three generations to escape poverty and Asian immigrants from middle class backgrounds even less time to become middle class Americans, it will undoubtedly take underclass Blacks, who carry the legacy of America's longest and most invidious discriminatory tradition, several generations to overcome their unique disadvantages.

Formal equal opportunity, our fundamental civil rights policy, contains a racially subordinating feature that, like slavery and Jim Crow, contributes to the plight of the Black underclass. Racial integration, one of the twin tenets of formal equal opportunity, subordinates the primary civil rights interest of underclass Blacks (the opportunity for decent living) by draining valuable resources from Black communities. Blacks left behind, especially the children, are deprived of community leaders and role models. Without these human resources, there is no one left within the ghetto to continuously expose children to the attitudes and values of mainstream society; to regularly help them deal with racial sensibility, sorrow, and other problems associated with the lingering effects of prior racial subordination and with adapting to a society that remains largely racist; and to eventually guide them out of a life of poverty and de-

spair. Formal equal opportunity, in short, gives low priority to the Black underclass' special needs.

If slavery and Jim Crow have sown the seeds of class paralysis, formal equal opportunity has certainly fertilized them. Formal equal opportunity's brand of racial subordination contributes to socioeconomic vulnerability within the Black underclass. By failing to recognize or to give greater deference to the Black underclass' civil rights interest in a decent level of existence — by providing for the removal of Black Sherpa guides and other vital community resources — the proclivity toward dysfunction and self-destruction within the Black underclass is prolonged and possibly intensified. Again, it is racial integration, not desegregation, that leads to these results.

PART VI CONCLUSION

*Brown v. Board of Education*⁴⁴⁰ created a revolutionary and promising civil rights policy — what I call formal equal opportunity. Formal equal opportunity replaced a civil rights policy — separate but equal — that subordinated Black Americans in virtually every sphere of life and caused severe social and economic dislocation within Black society, the effects of which are likely to continue for generations to come. In so doing, formal equal opportunity made Black Americans fully human in the eyes of the law, from which a myriad of social, economic, political, and psychological benefits have accrued to Black Americans and to society as a whole.⁴⁴¹

Yet it cannot be denied that formal equal opportunity has failed to equalized the living conditions of Black and White Americans. The “racial gap” (two-to-one in favor of Whites) has not changed under formal equal opportunity.⁴⁴² More specifically, each segment of Black society experiences socioeconomic problems under formal equal opportunity that are quite different from those encountered by their White counterparts. Middle-class Blacks face loneliness, disaffection, stress and hypertension, complex racial discrimination, and *de facto* segregation in high-level jobs.⁴⁴³ Working-class Blacks endure housing discrimination and segregation, often accompanied by violence, a lack of quality education in primary schools, and low enrollment in higher education.⁴⁴⁴ Underclass Blacks are plagued by a proclivity toward socioeconomic dysfunction and self-destruction.⁴⁴⁵

My thesis is that formal equal opportunity is more than an inade-

440. 347 U.S. 483 (1954).

441. See *supra* text accompanying notes 16-33.

442. See *supra* text accompanying notes 38-39.

443. See *supra* text accompanying notes 66-122.

444. See *supra* text accompanying notes 212-34.

445. See *supra* text accompanying notes 375-404.

quate remedy for today's version of the American race problem (socioeconomic vulnerability within Black society). Formal equal opportunity fuels the very conditions it seeks to ameliorate. It does so because decisionmakers (whether formalists or instrumentalists⁴⁴⁶) too often apply formal equal opportunity's twin tenets (racial omission and racial integration⁴⁴⁷) in ways that subordinate (give low priority to) the civil rights interests of Black Americans. And such racial subordination contributes to the American race problem because it denies Black Americans resources that are necessary to alleviate the conditions that define the American race problem.⁴⁴⁸ Consequently, formal equal opportunity leaves Black Americans more vulnerable than they otherwise need be to racial discrimination and segregation in employment and housing, poor public education, low college enrollment, a proclivity toward dysfunction and self-destruction and other socioeconomic conditions that define the American race problem. Formal equal opportunity thereby accommodates, prolongs, and intensifies the American race problem. It may even encourage certain conditions of the American race problem, such as complex racial discrimination.⁴⁴⁹ In short, under formal equal opportunity, Black Americans are (still) called upon to shoulder a disproportionate amount of racial discrimination, segregation, and other societal hardships. This fact of American life simply cannot be denied.

For this reason, one is left to wonder whether the best days of formal equal opportunity are behind us. Should the focus of civil rights scholarship and policymaking be on a search for a successor civil rights policy? Is there an historical process at work that moves us through indenture servitude (1619-1638), slavery (1638-1863), separate but equal (1863-1954), formal equal opportunity (1954-present), and finally to a new racial paradigm that delivers genuine equal opportunity? Or is formal equal opportunity the capstone of this historical movement, leaving civil rights scholars and policymakers with the difficult task of "patching up" its defects? In short, do we look within or without the existing racial paradigm for a remedy to the problem of racial subordination?

I believe these are the questions for the current generation of civil

446. *See supra* text accompanying notes 40-52.

447. *See supra* text accompanying notes 33-34.

448. *See supra* text accompanying notes 67-122, 212-34, 359-404 and 366-69 for a summary of these conditions.

449. *See supra* text accompanying notes 270-79.

rights scholars and policymakers. The recent passage of the Fair Housing Amendments Act of 1988⁴⁵⁰ is a small step in the right direction. But any attempt to construct a normative response to the question of where do we go from here should meet at least three conditions: (1) it must be attentive to class stratification in Black society; (2) it must be careful to avoid new forms of racial subordination; and (3) it must be reconcilable with the basic structure and direction of American society — our liberal democratic state. To illustrate how these conditions might operate, it may be useful to apply them to the Critical Legal Studies (CLS) movement, which many believe offers vision to civil rights scholars and policymakers.

Comprised of a heterogenous constellation of legal scholars⁴⁵¹ who have moved far beyond their roots in legal realism,⁴⁵² CLS believes that a fundamental restructuring of society is necessary for a more just society. CLS arrives at this position from the basic premise that the rule of law cannot bring about significant social change (“social transformation”).⁴⁵³ Behind this premise is an analysis (“deconstruction” or “trashing”) of law and the Anglo-American legal tradition (“Western liberalism” or “liberal legalism”) that makes the following points: legal doctrine is fashioned out of conflicting values (such as, public versus private, individual versus community, good versus evil, and freedom versus security) as well as political considerations;⁴⁵⁴ the language in which rights are stated fails to recognize differences in wealth and political power;⁴⁵⁵ and when minorities and

450. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, approved Sept. 13, 1988, *amending* 42 U.S.C. 3601-31 (1982). The amendments, *inter alia*: give the Secretary of Housing and Urban Development (HUD) authority to investigate charges of housing discrimination, file a complaint on his or her own initiative, seek conciliation, or refer charges to the Attorney General for prosecution in federal court (Section 810); give the charging party (and the respondent as well) the option to have the dispute resolved in a hearing before an administrative law judge or in a civil action (Section 812); give administrative law judges authority to assess civil penalties between \$10,000 and \$50,000, depending on the frequency of violation (Section 812(g)); and give the Attorney General authority to seek civil penalties of between \$50,000 and \$100,000, depending on the frequency of violation, against individuals or groups found to have engaged in a pattern or practice of housing discrimination (Section 814).

451. See generally Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

452. See Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984). For a discussion of legal realism, see *supra* note 41 and accompanying text.

453. See, e.g., Gable & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 4, 54 (1984).

454. See, e.g., Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 287 (D. Kairys ed. 1982); Greer, *Antonio Gramsci and “Legal Hegemony”*, in *id.* at 305. Gabel, *The Phenomenology of Rights-Consciousness and the fact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1577 (1984).

455. See, e.g., Sparer, *supra* note 452, at 516; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 594 (1984); Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW:

other "marginalized people" rely on rights granted ("loaned") by the government, they have nothing concrete, only intoxicating rhetoric on which to rely, they become blind to the real political choices at stake, they become dependent on the government for creating social change, and, worse, they confirm the legitimacy of America's oppressive class structure (rights are "indeterminate," "inalienable," "unstable," "coopting," and serve a "hegemonic and legitimating function").⁴⁵⁶

While many of the individual claims advanced by CLS have merit, but are not particularly new,⁴⁵⁷ CLS taken as a whole is a naive and false response to the question of where do we go from here. It fails to meet all three conditions. Hence, CLS offers no direction for civil rights scholars and policymakers.

With respect to the first condition — the need to be cognizant of class structure in Black society—CLS is nonresponsive to the particular problems and interests of each class within Black society. Further, CLS seems to assume that class leveling will necessarily resolve the problem of racism, but then again CLS never really deals with the issue of race or color, as scores of minority scholars have pointed out.⁴⁵⁸

A PROGRESSIVE CRITIQUE 111, *supra* note 460, at 111.

456. See, e.g., Gordon, *supra* note 453, at 27; Gabel, *supra* note 453, at 1577; Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364, 1370-71, 1375 (1984); Trubek, *Where the Action is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 578 (1984). See generally Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Gabel, *Reification in Legal Reasoning*, 3 RES. IN L. & SOC'Y 25 (1980); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

457. For example, more than 100 years ago, Holmes underscored the indeterminate and unstable quality of rights. In Lecture I of his 1881 book *THE COMMON LAW*, a lecture that dealt with the early forms of liability, Holmes begins with the following powerful passage:

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be govern. . . .

O. HOLMES, *THE COMMON LAW* 5 (M. Howe ed. 1963).

458. For a critique of CLS by minority scholars, see, e.g., Crehshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Delgado, *Critical Legal Studies and the Realities of Race — Does the Fundamental Contradiction have a Corollary?* 23 HARV. C.R.-C.L. L.

CLS' failure to deal with racism, an important fact of life for Black Americans, says something about its ability to avoid new forms of racial subordination which is the second condition. CLS not only fails to factor in racism in its theory of social oppression but also fails to do so in its model of the just society (autonomous individuals living in small communities). The omission of racism gives no respect to a Black American perspective on life in America. It treats Black Americans — their problems, their interests, their hopes, their desires — as invisible. It also generates a false understanding of the role of rights in social transformation. That is, by taking the Black experience into account, one is able to see clearly that rights *do* matter in the lives of an oppressed people. It matters to a Black American whether he or she has no right to sit at the front of the bus or a fundamental right to sit wherever he or she desires. To go from one situation (separate but equal) to the other (formal equal opportunity) is significant social transformation. Also, "rights consciousness" is important to an oppressed people because it gives them status and protects against government-sponsored and some forms of private racism, whether such racism takes place in large or small communities.⁴⁵⁹ In short, CLS has its own brand of racial subordination and that alone destroys its ability to offer sound guidance for today's civil rights scholars and policymakers.

The final condition — that any theory of remediation must be consistent with our liberal democratic state — is also fatal to CLS. The CLS movement seems to call for fundamental change in society's structure.⁴⁶⁰ This is highly chimerical. There is simply no market in this country for a radical restructuring of a society that has benefited far more people than it has oppressed. Not even Black Americans, who along with Native Americans remain at the bottom of the socioeconomic ladder,⁴⁶¹ are inclined to jettison the existing social order. No theory of social change can be realistic if it goes in one direction while the course of society goes in the opposite direction.

If my thesis concerning formal equal opportunity is substantially correct,⁴⁶² then the issue of where do we go from here or, more specifically, the issue of how do we remedy racial subordination through

REV. 407 (1988); Delgado, *The Ethereal Scholar: Does CLS Have What Minorities Want?*, 22 HARV. CL-CR L. REV. 301 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Dalton, *The Clouded Prism*, 22 HARV. C.L.-C.R. L. REV. 437 (1987); Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 L. & INEQUALITY 103 (1987).

459. See, e.g., U.S. CONST. amends. XIII, XIV.

460. See *supra* text accompanying note 452.

461. See, e.g., L. THURLOW, *THE ZERO SUM SOCIETY* 184-87 (1980).

462. See *supra* text accompanying notes 445-449.

formal equal opportunity, may be the central issue with which civil rights scholars and policymakers must now grapple. Any normative response to this issue must be cognizant of class stratification within Black society, racial subordination, and the dictates of our liberal democratic state. To ignore these conditions is to risk creating a new civil rights theory or movement that is less viable, livable, or comfortable for Black Americans than is the received tradition — warts and all.

